Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

GREGORY BERRY, PHILLIP MARCUS,
DENNIS MCALLISTER and FRANCIS ORAVETZ,

PETITIONERS,

v.

COUNTY OF SONOMA,
SONOMA COUNTY SHERIFF'S DEPARTMENT,
SONOMA COUNTY BOARD OF SUPERVISORS,
JANET NICHOLAS, JAMES HARBERSON, TIM SMITH,
NICK ESPOSITO, ERNEST CARPENTER
and RICHARD MICHAELSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does Fed.R.Civ.P. 52(a) permit a court of appeals to conduct plenary review of a district court's finding after a bench trial that plaintiffs performed work under the Fair Labor Standards Act?

2. Is an individual worker's right to overtime pay under the Fair Labor Standards Act waived where the applicable collective-bargaining agreement does not provide for such pay?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings in the courts below are listed in the caption. Although the lower courts included Forrest Fasig and N. Tom Siebe in the caption as co-plaintiffs, Fasig and Siebe withdrew from this action before the District Court's judgment.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Gregory Berry, Phillip Marcus, Dennis McAllister and Francis Oravetz pray that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the District Court denying cross-motions for summary judgment is reported at 763 F.Supp. 1055 (N.D. Cal. 1991), and is set forth at pages 67 to 76 of the appendix (App. 67a-76a). The decision of the District Court granting judgment for plaintiffs after trial is reported at 791 F.Supp. 1395 (N.D. Cal. 1992). App. 21a-66a. The decision of the Court of Appeals reversing and directing judgment for defendants is reported at 30 F.3d 1174 (9th Cir. 1994). App. 1a-20a. On September 14, 1994, the Court of Appeals denied the Berry plaintiffs' petition for rehearing. App. 77a.

JURISDICTION

The Court of Appeals denied the Berry plaintiffs' timely petition for rehearing on September 14, 1994. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 7(a)(1) of the Fair Labor Standards Act, 29 U.S.C §207(a)(1), provides in relevant part:

> Except as otherwise provided in this section, no employer shall employ any of his employees * * * for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 7(k) of the Fair Labor Standards Act, 29 U.S.C. §207(k), provides in relevant part:

> No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in * * * law enforcement activities if
>
> (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or
>
> (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

The regulations of the Department of Labor, Wage and Hour Division, 29 C.F.R. §553.230(c)(1993), provide in relevant part:

> [O]vertime compensation (in premium pay or compensatory time) is required for all hours worked in excess of the following maximum hours standards:

Work period (days)	Maximum hours standards Law enforcement
***	***
14	86

The regulations of the Department of Labor, Wage and Hour Division, 29 C.F.R. § 785.14 (1993), provide:

> Whether waiting time is time worked under the Act depends upon particular circumstances. The determination involves "scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait or they may show that he waited to be engaged." (*Skidmore v. Swift*, 323 U.S. 134 (1944)) Such questions "must be determined in accordance with common sense and the general concept of work or employment." (*Central Mo. Tel. Co. v. Conwell*, 170 F.2d 641 (C.A. 8, 1948))

The regulations of the Department of Labor, Wage and Hour Division, 29 C.F.R. § 785.17 (1993), provide:

> An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call". An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call. (*Armour & Co. v.*

Wantock, 323 U.S. 126 (1944); *Handler v. Thrasher*, 191 F.2d 120 (C.A. 10 (1951); *Walling v. Bank of Waynesboro, Georgia*, 61 F. Supp. 384 (S.D. Ga. 1945))

Fed.R.Civ.P. 52(a) provides in relevant part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon * * * Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness.

STATEMENT OF THE CASE

A. Facts

Petitioners Gregory Berry, Phillip Marcus, Dennis McAllister and Francis Oravetz are current and former deputy coroners employed by the Sheriff's Department of Sonoma County, California.

To comply with the Fair Labor Standards Act (FLSA), 29 U.S.C. §207(k)(2), the Sheriff's Department schedules each deputy coroner to work eight ten-hour shifts during each fourteen-day work period. App. 23a. Under the provisions of the FLSA, coroners are eligible for overtime pay for all work in excess of eighty-six hours per work period. *See* 29 U.S.C. §207(k); 29 C.F.R. §553.230(c); App. 23a.

California law requires coroners to respond to certain reported deaths twenty-four hours a day, seven days a week. App. 23a. During the years relevant to this case, however, the Sheriff's Department employed only three deputy coroners at any one time. App. 22a-23a. There was therefore a significant shortfall between scheduled work hours and the County's statutory obligation to have coroners available around the clock. *Id.*

To solve this problem, the Sheriff's Department required coroners to work additional hours on an "on-call" basis as a

condition of their employment. App. 23a. The Department scheduled each coroner for 20-30 hours per week of on-call duty. *Id.* Although coroners were paid for time spent actually responding to a call, they were not otherwise paid for on-call duty. *Id.*

B. Proceedings Below

1. The District Court

The deputy coroners brought this action under the Fair Labor Standards Act (FLSA), 29 U.S.C. §207, seeking overtime compensation for all on-call duty since December 1986. The plaintiff coroners contend that their on-call duty is compensable work under the FLSA because they could not "use the time effectively for [their] own purposes." 29 C.F.R. §785.17.

The County defendants responded that on-call duty did not prevent the coroners from using their time "effectively for their own purposes." The County argued that the coroners could sleep, read, watch television, and engage in other personal pursuits while on-call. The County further argued that the plaintiff coroners' FLSA claim must fail because their employment was covered by a collective-bargaining agreement negotiated by the Sonoma County Sheriff's Employees Association. Because this agreement did not provide for on-call compensation (except for the time spent actually responding to calls) the County argued that the coroners had acquiesced to the on-call compensation scheme.

The parties originally submitted the case on cross-motions for summary judgment. The District Court (Weigel, J.) denied both motions, ruling that there were genuine issues of material fact about the coroners' ability to engage in personal pursuits during on-call time, the amount of time coroners have to respond to calls, the ease with which coroners can trade on-call duty, whether coroners' ability to travel is restricted, and the frequency of calls not reflected in Coroner's Office statistics. *Berry v. County of Sonoma*, 763 F.Supp. 1055, 1059-60 (N.D. Cal. 1991), App. 74a-75a.

The parties then consented to a bench trial before Chief Magistrate Judge F. Steele Langford. The trial lasted five days. The parties examined a total of nine witnesses, including all four plaintiffs, and introduced 46 exhibits.

The District Court made the following findings:

— The average frequency of calls to on-call coroners was one per 4 hours on-call. App. 37a. Although the parties agreed to statistics showing an average of one death report every 6.45 hours, App. 18a, the District Court credited plaintiffs' testimony that the number of on-call interruptions was greater than the number of death investigations initiated. App. 40a.

— The policy of the Department was that on-call coroners must return calls within fifteen minutes. App. 33a. The District Court credited plaintiffs' testimony that the actual practice in the Coroner's Office was that coroners must initiate death investigations by telephone or in person, as soon as possible. App. 33a-34a. An in-person response to a death scene was required, on average, once every 17 hours on-call. App. 37a.

— The coroners were provided with pagers to use while on-call, but the pagers were unreliable. The District Court cited testimony that two plaintiffs lived in remote locations where they could not be reached by pager, while a third did not rely on the paging system because it was unreliable. App. 40a-41a.

— Although coroners could trade on-call shifts, the District Court credited plaintiffs' testimony that it was impractical to arrange trades because there were so few coroners working in the Department. App. 45a.

— The District Court concluded that the coroners' personal activities were substantially restricted while on call:

> They did not engage in activities which would make it difficult for them to respond promptly to a call. They did not pursue social activities with their families, both because of the restriction on having family mem-

> bers in their County vehicles and because they could be interrupted. They limited their consumption of alcohol to the extent that they wanted to present a sober image if they had contact with the public. For the same reason they refrained from strenuous or dirty activities like yard work or car maintenance while on-call, in order to be presentable to the public in case they would have to report in person to a death scene.
>
> Deputies made and received more telephone calls than they logged and charged to the County, and these interruptions were unpredictable and often disturbed their sleep.
>
> While on-call they remained in a constant state of readiness to work; they were engaged to wait.

App. 51a.

The District Court rejected the County defendants' argument that the coroners were not entitled to overtime pay because the applicable labor agreement did not provide for on-call compensation. The District Court held that this collective agreement could not nullify "the mandate and legal requirements of the FLSA." App. 56a. The District Court found that the County's violation of the FLSA was not willful, and granted judgment for plaintiffs for on-call wages commencing two years prior to the filing of this action, denying plaintiffs' request for liquidated damages. App. 63a.

2. The Court of Appeals

The Ninth Circuit (*per* T.G. Nelson, J.) reversed and directed judgment for the County defendants.

The Ninth Circuit claimed the power to review *de novo* whether the limitations imposed on employees' personal activities were so onerous that on-call time should be considered overtime work under the FLSA. App. 7a. Contrary to the District Court, the Ninth Circuit determined the following from the record:

> — The frequency of calls was one per 6.45 hours on call. The Ninth Circuit decided that the District Court's finding

that the average was one per 4 hours was "implausible" in light of the parties' statistics on the frequency of death reports. App. 18a n.8. The Ninth Circuit did not address the District Court's finding that these statistics understated the actual frequency of calls.

— The required response within fifteen minutes "is not a factor prohibiting the coroner's personal pursuits." App. 15a. Although the Ninth Circuit noted the District Court's finding that Department practice was to initiate investigations "as soon as possible" after receiving calls, App. 14a, the Ninth Circuit found it more significant the coroners were not required in writing to make such an immediate response. App. 3a n.2, 19a.

— "[T]he coroners' use of pagers eases restrictions while on-call and permits them to more easily pursue personal activities." App. 15a. The Ninth Circuit did not address the District Court's finding that three of the four plaintiffs were unable to use pagers because of their geographic location and the pagers' unreliability. *Cf.* App. 40a-41a.

— "The fact that coroners seldom are willing to impose on one another's off-duty time does not mean they cannot easily trade shifts if they seek to trade." App. 16a. The Ninth Circuit did not address the coroners' testimony, credited by the District Court, that they seldom requested trades because off-duty time was so valuable and there were so few other coroners with whom to trade on-call duty. *Cf.* App. 44a-45a.

— The Ninth Circuit found that the coroners were able to engage in some personal activities while on call, like watching television, socializing with friends and family, gardening and leather crafts. App. 17a. Contrary to the District Court, the Ninth Circuit concluded that "the coroners have actually engaged in personal activities, thereby effectively using on-call time for their own purposes." App. 18a.

The Ninth Circuit further held that the applicable collective-bargaining agreement between the parties was "one of the predominant factors" to consider in determining whether on-call duty was compensable. App. 7a. Because the labor agreement covering the coroners did not provide for pay for all on-call hours, the Ninth Circuit held that the coroners acquiesced to the non-compensable status of on-call duty by remaining on the job and failing to register "continuous protests." App. 10a-11a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision conflicts with decisions of this Court and several other circuits, and raises an important question of federal law that this Court should resolve, in two respects.

First, the Ninth Circuit's approach requires the federal courts to develop a federal common law of employment. If disputes about the nature of work are ultimately questions of law, the federal appellate courts will have to invent this common law on a case-by-case basis, without statutory guidance or deference to the trial courts. This approach will nullify the fact-finding power reserved to trial courts under Fed.R.Civ.P. 52(a), an outcome shown here by the Ninth Circuit's wholesale revisions of the District Court's inferences from the record. In this respect, the Ninth Circuit's decision conflicts with decisions of the Eighth and Tenth Circuits.

Second, the Ninth Circuit's decision revives the obsolete doctrine that an individual employee's statutory rights may be waived where the applicable collective-bargaining agreement does not separately provide for them. This Court rejected this doctrine in *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) and last Term in *Livadas v. Bradshaw*, ___ U.S. ___, 114 S.Ct. 2068, 2081-82 (1994).

1. The Ninth Circuit's decision weakens the division of authority between trial courts and appellate courts.

A. There is no federal common law of employment.

The critical inquiry in deciding whether on-call time is actually work time is "[w]hether time is spent predominately for the employer's benefit or for the employee's. . . " *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).

The problem is whether this is a question of law or a question of fact. This Court apparently settled this problem shortly after the enactment of the FLSA:

> We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court.

Skidmore v. Swift & Co., 323 U.S. 134, 136-137 (1944).

Notwithstanding *Skidmore*, there is a growing conflict within the circuits over whether appellate courts or trial courts have the primary authority to decide if a given set of employment duties is compensable work. The Eighth Circuit follows *Skidmore* to hold that the compensability of on-call duty is a fact question that cannot be resolved as a matter of law, *see Cross v. Arkansas Forestry Comm'n*, 938 F.2d 912, 916-917 (8th Cir. 1991); *Henson v. Pulaski County Sheriff's Dept.*, 6 F.3d 531, 537 (8th Cir. 1993). The Fifth and Eleventh Circuits formerly treated such disputes as matters for the fact-finder, *see Bright v. Houston Northwest Med. Center*, 888 F.2d 1059, 1064 (5th Cir. 1989); *Cole v. Farm Fresh Poultry, Inc.*, 824 F.2d 923, 929 & n.6 (11th Cir. 1987), but those courts now hold that the compensability of employment duties is ultimately a question of law reviewable *de novo*. *See Bright v. Houston Northwest Med. Center*, 934 F.2d 671, 675 (5th Cir. 1991)(*en banc*)(overruling panel opinion), *cert. denied*, ___ U.S. ___, 112 S.Ct. 882 (1992); *Birdwell v. City of Gadsden*, 970 F.2d 802, 807-808 (11th Cir. 1992). The Ninth Circuit's reversal of the trial court depends on its view, shared by the Fifth and Eleventh Circuits, that

"[w]hether a certain set of facts and circumstances constitute work for purposes of the FLSA is a question of law." App. 7a, *quoting Birdwell*, 970 F.2d at 807.

This doctrine puts the federal courts in a very awkward position. Because Congress has not legislated any statutory definition of work, this federal law will have to be a pure common law, divined by appellate judges from their own sense of what "real work" means. But "real work" has an elusive meaning that varies between different occupational and social contexts. The Department of Labor's regulations leave this determination to "common sense and the general concept of work or employment." 29 C.F.R. §785.14, *quoting Central Mo. Tel. Co. v. Connell*, 170 F.2d 641 (8th Cir. 1948). The Ninth Circuit's *de novo* standard means that appellate judges will have to interpret their own lay impressions of American worklife as if they were interpreting federal law.

This is not the proper function of the federal appellate courts. The district courts are better situated to decide whether an employee's duties meet the prevailing standards of work in a given occupation, or whether a given set of job restrictions effectively prevent employees from using time for their own purposes. The trial courts are able to hear the witnesses directly, and they have the authority to draw inferences from their cumulative sense of the evidence. *See Anderson v. Bessemer City*, 470 U.S. 564, 575-576 (1985). That is exactly what the District Court did in this case. The District Court's finding that coroners spent their time on-call "predominately for the employer's benefit," *Armour*, 323 U.S. at 133, has more authority than the Ninth Circuit's contrary impression because the District Court was "more closely in touch than the appeals court with the milieu out of which the controversy before [it] arises. . . ." *Anderson*, 470 U.S. at 580.

The Ninth Circuit's reversal of the District Court turns on the assumption that there is a uniform common-law distinction between work and leisure. For example, the Ninth Circuit ruled that on-call duties did not restrict the coroners' personal lives as a matter of law, because they could do certain things like

watch television or enjoy leather crafts while standing by. App. 17a. But Congress has not enacted a federal statute defining what pastimes are legally sufficient to qualify duty time as leisure rather than work. Waiting time may be work if "even though pleasurably spent, it was [not] spent in the ways the men would have chosen had they been free to do so." *Skidmore*, 323 U.S. at 139. Without statutory guidance, the appellate courts have no business declaring as a matter of law that employees are not truly working if, *e.g.*, they are able to play pool or listen to the radio while waiting for calls. This is exactly what the lower courts did in *Skidmore*, 323 U.S. at 136, and the Ninth Circuit repeats their error. Whether job duties infringe on employees' personal freedom enough to constitute work is a question for the fact-finder, not the federal common law. *Id.*, 323 U.S. at 136-137.

It is a telling anomaly that courts are now deciding FLSA overtime cases without trial as a matter of law, even as they stress that these summary judgments are confined to the facts of the case. *See, e.g., Kelly v. Hines-Rinaldi Funeral Home, Inc.*, 847 F.2d 147, 149 (4th Cir. 1988) (Murnaghan, J. concurring), *cert. denied*, 493 U.S. 835 (1989); *Martin v. Ohio Turnpike Comm'n*, 968 F.2d 606, 611 (6th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 979 (1993). A common feature of these decisions is that they canvass the federal reports in search of an appellate consensus about extremely specific details of American worklife. *See, e.g.*, App. 14a-15a (survey of appellate authority on whether a fifteen- or twenty-minute response requirement is unduly restrictive); *Bright*, 934 F.2d at 675-678 (same for seventeen-mile travel restrictions); *Birdwell*, 970 F.2d at 808-810 (same for usefulness of beepers and acceptable frequency of calls).

But the same fifteen-minute response time may restrict personal pursuits more in more sparsely populated communities like Sonoma County than in metropolitan Houston. *Cf. Bright*, 934 F.2d at 672. Electronic pagers that ease restrictions in towns like Gadsden, Alabama are not reliable for employees living in coastal or hilly areas like Sonoma County. *Compare Birdwell*,

970 F.2d at 804 *with* App. 41a. It is impossible to derive general rules that distinguish between the mental readiness required of a coroner scheduled to wait for death reports compared with a factory worker who may be called to return to an assembly line. Under a federal common law, the caselaw will become a crazy-quilt of *ad hoc* judgments about dissimilar configurations of fact.

As a result, contrary rulings about such details will accumulate as conflicts of law at the appellate level. Taken as a matter of law, the Ninth Circuit's ruling conflicts with *Renfro v. City of Emporia*, 948 F.2d 1529 (10th Cir. 1991), *cert. dismissed*, ___ U.S. ___, 112 S.Ct. 1310 (1992), which held firefighters' on-call time compensable under similar circumstances. The District Court found that the coroners' on-call response time, frequency of calls, restrictions on movement and family life were comparable to those of the *Renfro* firefighters. App. 32a, 37a, 42a, 48a-49a. Although the Ninth Circuit acknowledged that *Renfro* was conflicting authority (repeatedly citing it with the "*but see*" introductory signal, App. 15a, 18a) it distinguished *Renfro* with a series of factual assertions about the differences between California coroners' and Kansas firefighters' work. App. 19a. (As we discuss below, these factual assertions wrongly substituted the Ninth Circuit's inferences from the record for the District Court's.) The Ninth Circuit's treatment of *Renfro* shows how the appellate courts will have to draw ever-more-delicate analogies and distinctions between different work environments to keep the federal common law in one piece.

The appellate courts do not have the expertise or the authority to make judgments about the acceptable limits of work and leisure as a matter of national law. The appellate courts should leave such matters to the trial courts as questions of fact, as the Eighth Circuit now does. *See May v. Arkansas Forestry Comm'n*, 993 F.2d 632, 637-639 (8th Cir. 1993) (affirming jury verdict after reversal of a contrary summary judgment in *Cross, supra*).

B. The Ninth Circuit substituted its own factual inferences for those of the District Court, in violation of Fed.R.Civ.P. 52(a).

The Ninth Circuit professed a rule of deference to the trial court's subsidiary findings, and claimed to exercise *de novo* review only for the ultimate question whether the coroners' duties were so onerous that they could be considered work. App. 6a-7a. Even if it were faithfully observed, the Ninth Circuit's distinction between the ultimate issue and the subsidiary facts repeats the error corrected in *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). Like the issue of discriminatory intent in *Pullman-Standard*, the ultimate issue whether the coroners's on-call time was spent predominately for the employer's benefit or for the employees' is one of fact. *Armour & Co.*, 323 U.S. at 133. Fed.R.Civ.P. 52(a) does not distinguish between "ultimate" and "subsidiary" facts: an appellate court is bound to defer to the trial court's findings as to both. *Id.* at 287.

In any case, the Ninth Circuit did not comply with Fed.R.Civ.P. 52(a) even as to the District Court's subsidiary findings. Instead, the Ninth Circuit made wholesale revisions in the District Court's inferences from the evidence:

— The Ninth Circuit changed the District Court's determination of the frequency of calls from one per 4 hours to one per 6.45 hours, ignoring the District Court's finding that the latter statistic understated the true frequency of calls. *Compare* App. 18a *with* App. 37a, 40a.

— The District Court credited plaintiffs' testimony that the actual practice in the Department was that coroners should initiate death investigations as soon as possible. App. 34a. By contrast, the Ninth Circuit fixated on the absence of a *written* response-time requirement, ignored all other inferences by the District Court, and then asserted that coroners were therefore under no limitations while on call. App. 3a n.2, 19a.

— The Ninth Circuit ruled that the District Court should have given more weight to the availability of pagers to ease

the restrictiveness of on-call duties, but it ignored the District Court's finding that three of the four plaintiffs could not use the pagers because of their remote location and the pagers' unreliability. *Compare* App. 15a *with* App. 41a.

— Although the District Court found that it was very difficult in reality for coroners to trade on-call shifts (because free time was scarce and there were so few coroners to trade with), App. 43a-45a, the Ninth Circuit decided that it was more important that coroners were technically allowed to trade, and made its own finding discounting the coroners' testimony: "The fact that coroners seldom are willing to impose on one another's off-duty time does not mean that they cannot easily trade shifts if they seek to trade." App. 16a.

On the "ultimate" question whether on-call duty was time spent predominately for the employer's benefit, the District Court's cumulative sense of the evidence was that the coroners were essentially at work while on call. The District Court emphasized that death reports occurred unpredictably with a substantial frequency that kept the plaintiffs in a constant state of readiness rather than repose. App. 51a. The Ninth Circuit's contrary judgment holds that it would have weighed the evidence differently than the District Court, and that by doing so, the Court "conclude[s] that the coroners can effectively use on-call time for personal pursuits." App. 20a.

This is exactly the kind of appellate fact-finding that Fed.R.Civ.P. 52(a) prohibits. *See Anderson*, 470 U.S. at 573-575. This approach reduces the trial judge to a scribe recording the undisputed facts, while reserving all disputed inferences regarding "work-like" nature of duties for the appellate court. This is not the appellate court's proper role in FLSA disputes over the character of work. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 713-714 (1986).

2. The Ninth Circuit's decision conditions employees' statutory rights on their power to negotiate such rights as a matter of private contract.

The Ninth Circuit reversed the District Court on the alternative ground that the coroners' collective-bargaining agreement did not provide for compensation for on-call hours. App. 7a-11a. The Ninth Circuit concluded that the coroners had therefore implicitly agreed that their on-call duties should not be characterized as work. App. 11a.

The Ninth Circuit's holding will have a very damaging effect on the enforcement of the FLSA, particularly in light of the facts of the case. The union representing the coroners demanded full overtime pay for all on-call hours in each round of collective bargaining after 1985, when the FLSA became applicable to local governments. App. 5a, 10a. Each time, the County rejected these proposals. App. 5a. The union could only negotiate a proviso that the parties did not intend to incorporate the FLSA into the contract. App. 10a. It is hard to understand what more the coroners and their union could have done: since coroners are law enforcement officers whose work affects public health and safety, they do not have the right to strike under California law. *See County Sanitation District v. Los Angeles County Employees' Ass'n*, 38 Cal.3d 564, 586-587 (1985). The Ninth Circuit nevertheless found that the union's demands were not really protests about on-call time, but were only part of the union's overall purpose to obtain better employment terms. App. 11a. The Ninth Circuit decided that the coroners had acquiesced in the County's policy, because they continued to accept paychecks without engaging in "continuous protests" over the terms of their employment. App. 10a-11a.

This approach to the statute will make the FLSA a dead letter. Employees should not have to go on strike or stage workplace demonstrations to secure rights that the legislature gave them by statute. The fact that unionized employees may bargain collectively does not mean that they have waived their statutory rights when they cannot secure those rights through

private bargaining. This was the Ninth Circuit's mistake corrected last Term in *Livadas v. Bradshaw*, ___ U.S. ___, 114 S.Ct. 2068, 2081 (1994), a mistake that the Ninth Circuit repeats in this decision. Coverage under the FLSA cannot depend on the ability of employees to succeed at the bargaining table. If it did, the FLSA would be nothing more than a duplicative federal remedy for breach of contract.

This is why this Court holds that "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (cit. om.) Even before *Barrentine*, the Ninth Circuit (speaking through then-Judge Kennedy) had ruled that FLSA overtime rights could not be waived by the terms of a collective bargaining agreement. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 513 (9th Cir. 1978). Although the District Court relied on *Lerwill*, the Ninth Circuit did not mention *Barrentine* or *Lerwill* in reversing.

Instead, the Ninth Circuit held that the agreement between the parties is "one of the predominant factors" in determining compensability. App. 7a. This doctrine is traceable to language in *Skidmore*, 323 U.S. at 137, that the fact-finder's task in gathering the surrounding circumstances of employment includes "scrutiny and construction of the agreement. . . ." The District Court noted this "seeming inconsistency between the Supreme Court's holding that the agreement between the parties is a factor to consider and its holding that agreements in violation of the FLSA are unenforceable." App. 74a, n.12. This tension has produced conflicting approaches in the circuits. *Compare Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245, 1248 (5th Cir. 1986) (plaintiffs' continuance of employment implied agreement that waiting time was not compensable; held to bar FLSA claim) *cert. denied*, 484 U.S. 827 (1987) *with Wethington v. City of Montgomery*, 935 F.2d 222, 229 (11th Cir. 1991) (presence or absence of agreement irrelevant to FLSA rights).

The Ninth Circuit asks an irrelevant question when it studies the agreement to find how the parties subjectively "characterized" the on-call duties, App. 8a. The parties' subjective characterization of an employee's duties is not pertinent to the FLSA. For example, in *Tony & Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290, 302 (1985), a religious sect argued that commercial labor performed by its members in church industries could not be treated as compensable work, because the church and its workers agreed that this labor should be characterized as "voluntary." This Court unanimously rejected this theory, holding that "[i]f an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or waive their protections under the Act." *Id.* at 302, citing *Barrentine*.

The Ninth Circuit has entered judgment for the County on the same theory rejected in *Tony & Susan Alamo Foundation*. Its decision invites employers to extract "agreements" as a condition of employment recharacterizing work duty as volunteer time or leisure time or independent-contractor's time. The Court needs to revisit this issue to ensure that employers with superior bargaining power do not dictate how the FLSA will apply to their employees.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 92-16772, 92-16816

GREGORY BERRY; FORREST FASIG; PHILLIP MARCUS; DENNIS MCALLISTER; FRANCIS ORAVETZ; and N. TOM SIEBE,

PLAINTIFFS-APPELLEES, CROSS-APPELLANTS

v.

COUNTY OF SONOMA; SONOMA COUNTY SHERIFF'S DEPARTMENT; SONOMA COUNTY BOARD OF SUPERVISORS; JANET NICHOLAS; JAMES HARBERSON; TIM SMITH; NICK ESPOSITO; ERNEST CARPENTER; and RICHARD MICHAELSON,

DEFENDANTS-APPELLANTS, CROSS-APPELLEES

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STANLEY A. WEIGEL, District Judge, Presiding

Argued and Submitted
May 11, 1994—San Francisco, California

Filed July 26, 1994

Before: John T. Noonan, Jr., Thomas G. Nelson, Circuit Judges, and David A. Ezra, U.S. District Judge for the District of Hawaii, sitting by designation

Opinion by Judge Nelson

T.G. NELSON, Circuit Judge:

OVERVIEW

Gregory Berry (Berry), Phillip Marcus (Marcus), Dennis McAllister (McAllister), and Francis Oravetz (Oravetz), current and former deputy coroners (collectively referred to as "the coroners") brought this action against their employer, the Sonoma County Sheriff's Department, the County of Sonoma and the Sonoma Board of Supervisors (collectively referred to as "Sonoma County"), seeking overtime compensation for time spent waiting on-call from December 1986 until the present pursuant to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 *et seq*. The district court held that Sonoma County had violated the FLSA by failing to compensate the coroners for on-call waiting time and awarded them damages and attorneys' fees pursuant to 29 U.S.C. § 216(b). However, the district court limited its award by holding that Sonoma County's FLSA violation was in good faith, based on a reasonable belief of compliance, and was not willful. As a result, the coroners were not entitled to liquidated damages, *see* 29 U.S.C. § 260, and the statute of limitations was two years, instead of three years, *see* 29 U.S.C. § 255(a).[1] Sonoma County appeals the judgment for the coroners. The coroners cross-appeal the district court's holding that Sonoma County did not willfully or in bad faith violate the FLSA and request attorneys' fees. We reverse the district court's judgment in favor of the coroners.

FACTS AND PROCEDURAL HISTORY

The coroners are required by California state law to respond to certain reported deaths twenty-four hours a day, seven days a week, including holidays. See Cal. Gov't Code §§ 27491 *et seq*.; Cal. Health & Safety Code §§ 10250 *et seq*. The Coroner's Office has regular business hours Monday through Friday from

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[1] The district court's opinion is reported at *Berry v. Sonoma County*, 791 F. Supp. 1395 (N.D. Cal. 1992).

8 a.m. to 5 p.m. However, because the coroners have a statutory obligation to be available at all times, one coroner is always "on-call" when no coroner is "on-duty."

The investigations a coroner conducts while on-call are very similar to those which he conducts while on-duty. Death reports are immediately reported to the on-call coroner regardless of the time received. To maintain communication, Sonoma County provides coroners with a telephone, pager, two-way radio and county van. The parties agree that the coroners respond as soon as possible to death reports and are required to answer a page or telephone call within fifteen minutes.[2] When a death report is received, if the coroner determines it is a coroner's case, he either conducts an investigation by telephone or visits the scene of the death depending on the nature of the case.

Two factors distinguish on-call duties from regular duties. First, while on-call, a coroner is not required to respond to reports of nursing home deaths but may postpone such an investigation until his next regular on-duty shift. Second, when a coroner is on-call, he is not required to be at the Coroner's Office. Instead, he may conduct his investigations from his home or other locations outside the office but within Sonoma County.

Because of the requirement that coroners be immediately available to investigate death reports while on-call, the coroners claim their personal activities while waiting on-call for a death report are restricted. They claim they are not able to leave Sonoma County to engage in hobbies or activities such as camping, hunting, fishing, socializing and attending sporting events. Further, they remain in areas which are accessible by pager. They do not engage in activities where interruptions

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[2] There is no written policy requiring a fifteen minute response time, although the Sheriff's Department Policy and Procedure Manual § 21.29 requires "a deputy coroner shall be dispatched immediately" upon the report of a death.

would be unwanted such as attending movies, dining out, shopping or working on labor-intensive tasks. They remain prepared to meet the public by not engaging in activities in which they would become dirty and by not consuming alcohol in amounts which would affect their sobriety. Finally, when they do travel, they are forced to take a separate vehicle because citizens may not ride in the county van.[3]

Despite the restrictions on their personal activities created by geographical, communication and transportation limitations, the record reflects activities in which the coroners have been able to participate while on-call. Coroners have been able to socialize with friends, dine out, shop, read, watch television and enjoy hobbies such as gardening, working on antique cars, leather crafts and photography. Berry taught a course at a local junior college and held the position of Battalion Chief of the local volunteer fire department.

Prior to 1982, coroners received five percent of their hourly pay for each hour on-call. However, in 1982 a new agreement was reached, the relevant provisions of which have been incorporated into successive Memorandums of Understanding (MOUs) resulting from collective bargaining between Sonoma County and the Sheriff's Office Employee Association (Association). Pursuant to the 1982 agreement, coroners received a five percent increase in their base salaries. No overtime compensation is paid for time spent waiting on-call and not actually working. However, for each death report investigated while on-call, the coroner receives guaranteed minimum overtime pay, regardless of the time it takes to investigate the death report, calculated at a rate of one and one-half times the regular hourly rate. Initially, the coroners received a two-hour guaranteed minimum for each death report investigated while on-call. Later, the hourly minimum was reduced for telephone cases. Now, for each telephone case investigated, a coroner

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[3] The Sheriff's Department Policy & Procedure Manual § 14:34 provides that "citizens will not be transported in Departmental vehicles unless necessary to accomplish a Departmental purpose."

receives a minimum of one hour paid overtime. For each call-back case investigated, a coroner receives a minimum of two hours paid overtime.

During collective bargaining sessions in 1986, 1988 and 1990, the Association requested overtime pay for all hours during which a coroner was on-call. These requests were rejected. The only other evidence that the coroners were dissatisfied with the working conditions as a result of on-call duty was an Employee Hazard Report filed in July 1988 by Berry, Marcus and another deputy coroner not a party to this suit. According to the report, because the coroners were required to work twenty-four hours per day for four days consecutively, they were receiving insufficient sleep and rest periods away from active duty. The coroners requested an increase in staff to reduce the work load thereby relieving them of the four day consecutive work shift.

The coroners brought this action pursuant to the FLSA against Sonoma County seeking overtime compensation for on-call waiting time, *i.e.*, the time on-call which coroners were required to be prepared to investigate death reports but were not actually working, from December 1986 until the present. The district court denied the parties' cross-motions for summary judgment,[4] finding disputed facts regarding whether the coroners were able to conduct personal activities during on-call shifts and whether Sonoma County violated the FLSA willfully or in bad faith. It also found material issues of fact relating to the amount of damages.

After a five day trial, the district court held that Sonoma County had violated the FLSA by failing to compensate the coroners for on-call waiting time and awarded them damages and attorneys' fees pursuant to 29 U.S.C. § 216(b). However, the district court limited its award by holding that Sonoma County's FLSA violation was in good faith, based on a reasonable belief of compliance, and not willful. As a result, the coroners were not entitled to liquidated damages, *see* 29 U.S.C.

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[4] This decision is reported at *Berry v. County of Sonoma*, 763 F.Supp. 1055 (N.D. Cal. 1991).

§ 260, and the statute of limitations was two years, opposed to three years, *see* 29 U.S.C. § 255(a). Sonoma County appeals the judgment for the coroners. The coroners cross-appeal the district court's holding that Sonoma County did not willfully or in bad faith violate the FLSA and request attorneys' fees on appeal.

DISCUSSION

I. On-Call Time as Compensable Overtime

In general, the FLSA requires that employers pay overtime compensation to employees for hours worked in excess of forty hours per work week. 29 U.S.C. § 207(a). We recently addressed the issue of whether on-call waiting time, *i.e.*, time spent on-call but not actually working, is compensable overtime under the FLSA in *Owens v. Local No. 169, Ass'n of W. Pulp and Paper Workers*, 971 F.2d 347, 350 (9th Cir. 1992), where mechanics at a pulp mill sought overtime pay for on-call waiting time. We held that the two predominant factors in determining whether an employee's on-call waiting time is compensable overtime are "(1) the degree to which the employee is free to engage in personal activities; and (2) the agreements between the parties." *Id.* (footnotes omitted). Finding express, constructive and collective bargaining agreements between the parties and that mill mechanics were free to engage in their own personal activities, we reversed the district court's summary judgment holding that on-call waiting time was compensable work. *Owens* controls our decision in this case.

A. Standard of Review

We review the district court's findings of fact for clear error and its interpretations of the FLSA *de novo*. *Drollinger v. State of Arizona*, 962 F.2d 956, 958 (9th Cir. 1992). Whether and to what extent employees are able to use on-call time for personal activities is a question of fact. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714, 89 L. Ed. 2d 739, 106 S. Ct. 1527 (1986); *Birdwell v. City of Gadsden, Ala.*, 970 F.2d 802, 807-08

(11th Cir. 1992). However, whether the limitations on the employees' personal activities while on-call are such that on-call waiting time would be considered compensable overtime under the FLSA is a question of law which we review *de novo. See Birdwell* at 807 ("Whether a certain set of facts and circumstances constitute work for purposes of the FLSA is a question of law."); *cf. Icicle Seafoods*, 475 U.S. at 714. Whether there was an agreement between the employer and the employees that employees would receive compensation only for actual work conducted while on-call is also a question of fact which must stand absent clear error. *Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245, 1248 (5th Cir. 1986), *cert. denied*, 484 U.S. 827, 98 L. Ed. 2d 56, 108 S. Ct. 95 (1987).

B. Agreements Between the Parties Regarding Compensation for Overtime

As previously noted, agreements between the parties are one of the predominant factors to be considered in determining whether the employees' on-call waiting time is compensable.[5] *Owens*, 971 F.2d at 350. In *Owens*, this court found the possibility of three different types of agreements between the employer and employees which may be relevant to the issue of on-call compensation. An agreement may be found if employees are employed pursuant to a "collective bargaining agreement that provides overtime compensation for actual call-in work, but not for other off-duty time." *Id.* at 355. A constructive agreement may arise if employees have been informed of

[5] Sonoma County contends agreements regarding overtime compensation are dispositive, relying on *General Elec. Co. v. Porter*, 208 F.2d 805 (9th Cir. 1953), *cert. denied*, 347 U.S. 951, 98 L. Ed. 1097, 74 S. Ct. 676 (1954), and *Rural Fire Protection Co. v. Hepp*, 366 F.2d 355 (9th Cir. 1966). We reject this contention. These cases address the specific issue of whether sleeping time is compensable. The regulations state that implied and express agreements are dispositive with respect to compensation for sleeping time. See 29 C.F.R. §§ 553.222(c) and 785.22(a). However, in cases addressing whether on-call waiting time is compensable, agreements, although a predominant factor to be considered, are not dispositive. *See Owens v. Local No. 169, Ass'n of W. Pulp and Paper Workers*, 971 F.2d 347, 354 (9th Cir. 1992) (agreement is relevant but not always controlling).

the overtime compensation policy and continue to work under the disclosed terms of the policy. *Id.* at 354-355. Finally, an express agreement is created if the employees voluntarily accept the terms of the policy by becoming employed after an overtime compensation policy has been implemented. *Id.* at 355.

The significance and importance of evaluating the agreements between the parties is that the existence of such agreements assists the trier of fact in determining whether the parties characterized the time spent waiting on-call as actual work. An agreement between the parties which provides at least some type of compensation for on-call waiting time may suggest the parties characterize waiting time as work. Conversely, an agreement pursuant to which the employees are to be paid only for time spent actually working, and not merely waiting to work, may suggest the parties do not characterize waiting time as work.

Our emphasis of the parties' agreements as a predominant factor is not intended to suggest that agreements are controlling regardless of the character of the uncompensated time at issue. The Supreme Court stated in *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602, 88 L. Ed. 949, 64 S. Ct. 698 (1944), that the FLSA was not designed to perpetuate contracts pursuant to which employers fail to compensate employees for work. The Court in that case noted that there was no uncertainty that the uncompensated time at issue, *i.e.*, time spent travelling underground in mines to the work site, was actually work. *Id.* However, it specifically noted that it was not addressing a situation where there were "serious doubts as to whether certain activity or non-activity constituted work or employment." *Id.* at 603. In such a situation, the parties' agreements are persuasive evidence of whether they intended to define the activity or non-activity as work. Unlike the uncompensated time at issue in *Muscoda*, there is uncertainty whether on-call waiting time is actual work, and consequently, inquiry into the parties' characterization of on-call waiting time is necessary.

The district court in this case concluded the parties had an agreement regarding overtime compensation. Focusing on the collective bargaining agreement between the parties, it found:

> [T]he parties did have an agreement regarding compensation for work done during on-call shifts. The agreement included a two-hour minimum, later reduced to a one-hour minimum, at one and one-half times the deputy's regular hourly pay, for telephone investigations and a two-hour minimum, at the same rate, if the deputy were actually called to a death scene, regardless of the actual time spent.

Berry, 791 F. Supp. at 1415. Also relevant to the existence of an agreement between the parties is the district court's finding that "each plaintiff understood the requirements of the job before he applied for and accepted the position." *Id.* at 1413.

These findings support the conclusion that Sonoma County's overtime compensation policy was pursuant to agreements between the parties. The parties' collective bargaining agreement, memorialized by MOUs, expressly provides for "compensation for work done during on-call shifts," *id.* at 1415, but does not provide compensation for on-call waiting time.[6] Also, three of the coroners expressly agreed to Sonoma County's overtime compensation policy by accepting employment after the policy had been implemented in 1982.[7] The district court's finding that the coroners all knew the requirements of the job before they applied and accepted the position supports the conclusion that these coroners expressly agreed to the policy. Finally, although Berry did not expressly agree to the policy because he became a coroner prior to implementation of the policy, he continued to work pursuant to the policy for nine of the eleven years Sonoma County employed him as a coroner; as a result, Berry constructively agreed to the policy.

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[6] The five percent base salary increase which was implemented in 1982 was not compensation for on-call waiting time. Instead, the district court found that the five percent increase was a premium for expertise. *Berry v. Sonoma County*, 791 F.Supp. 1395, 1415 (N.D. Cal. 1992).

[7] Oravetz began in 1988; McAllister began in 1989; and Marcus was employed from 1983 until 1988.

The coroners object to consideration of the collective bargaining agreement as a predominant factor. They offer several arguments, including these: MOUs do not incorporate the FLSA; Sonoma County's on-call policy does not attempt to comply with FLSA standards because it was initially implemented in 1982 prior to the application of the FLSA to public agencies; and neither the Association, representing the coroners during collective bargaining, nor the coroners themselves have acquiesced to the on-call system. None of these arguments has merit.

It is true each of the MOUs expressly stated that they do not intend to incorporate the FLSA into the contract. However, this exclusion does not preclude review of the MOUs to determine if the parties defined on-call waiting time as compensable work. Further, the coroners' claim that the MOUs reflect an on-call compensation policy which was implemented in 1982 before the FLSA applied to public agencies does not preclude review of the collective bargaining agreement. The FLSA became applicable to local government entities in 1985. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985). The coroners seek overtime compensation from 1986 until the present. Even though the policy was initially implemented in 1982, it has been subject to renegotiation in 1986, 1988 and 1990, continues presently and is relevant to an inquiry regarding whether on-call waiting time is characterized as work.

Finally, contrary to the coroners' claim, evidence is lacking to find the coroners have not acquiesced to the terms of the collective bargaining agreement. Continuous protests to an agreement prevent acquiescence to that agreement even though employees continue to work pursuant to it. *See Beebe v. United States*, 226 Ct. Cl. 308, 640 F.2d 1283, 1291 (Ct. Cl. 1981) (employees continuously objected to computation of overtime pay and sought relief from time FLSA became applicable); *cf. Johnson v. City of Columbia, S.C.*, 949 F.2d 127, 131 (4th Cir. 1991) ("If the employee did not protest and continued to work and receive paychecks, the courts have found that an implied

agreement did arise between the parties."). The Employee Hazard Report submitted in July 1988 is the only evidence that the coroners themselves protested the overtime requirements of their position. This evidence is insufficient to find coroners have not acquiesced in the policy for several reasons. First, it does not support the conclusion that the objection to the policy was on-going and continuous; instead, it was only a singular incident. Second, the report only objects to the amount of overtime required; it did not object to the lack of compensation for that overtime which is now at issue. Finally, the report was submitted only by Berry and Marcus. There is no evidence that McAllister and Oravetz subsequently adopted the report. Furthermore, the Association's requests during collective bargaining for additional overtime compensation do not support a finding that the Association was actually protesting overtime compensation; at most, the requests merely reflect the Association's overall purpose of obtaining better employment terms. Despite the coroners' many objections to the relevance of the collective bargaining agreement, it is relevant to the parties' characterization of on-call waiting time.

We hold that Sonoma County's overtime compensation policy is pursuant to constructive and express agreements and collective bargaining agreements between Sonoma County and the coroners and that the terms of those agreements are that the coroners will receive compensation only for actual work conducted on-call and not for on-call waiting time. Although these agreements are not dispositive, their characterization of on-call waiting time weighs against concluding on-call waiting time is work.

C. Coroners' Ability to Engage in Personal Activities as a Predominant Factor

Another predominant factor in determining whether on-call waiting time is compensable is "the degree to which the employee is free to engage in personal activities." *Owens*, 971 F.2d at 350 (footnote omitted). The proper inquiry is "whether [an

employee] is so restricted during on-call hours as to be effectively engaged to wait." *Id.* at 354. The requisite degree to which an employee must be free to engage in personal activities does *not* require that:

> the employee . . . have substantially the same flexibility or freedom as he would if not on call, else all or almost all on-call time would be working time, a proposition that the settled case law and the administrative guidelines clearly reject.

Id. at 350-51 (quoting *Bright v. Houston Northwest Medical Ctr. Survivor, Inc.*, 934 F.2d 671, 677 (5th Cir. 1991) (en banc), *cert. denied*, _____ U.S. _____, 116 L. Ed. 2d 786, 112 S. Ct. 882 (1992)).

In *Owens*, we provided an illustrative, non-exhaustive list of factors to be analyzed in determining the degree to which an employee is free to engage in personal activities while on-call. *Id.* at 351. It included:

> (1) whether there was an on-premises living requirement; (2) whether there were excessive geographical restrictions on employee's movements; (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for response was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities; (6) whether use of a pager could ease restrictions; and (7) whether the employee had actually engaged in personal activities during call-in time.

Id. (footnotes omitted). Because "no one factor is dispositive," *id.*, a court should balance the factors permitting personal pursuits against the factors restricting personal pursuits to determine whether the employee is so restricted that he is effectively engaged to wait. Because the district court did not have the guidance of our decision in *Owens*, it failed to make conclusions regarding the proper inquiries. However, relying on its findings, these conclusions can be made by this court. We hold all of the relevant factors in this case, except perhaps one, weigh in favor of concluding the coroners are free to engage in personal activities while on-call.

1. Whether On-Call Duties are Similar to and as Demanding as Regular Duties

The district court considered whether the coroners' duties on-call are similar to and as demanding as their regular duties, noting that a similarity of duties "would tend to show restrictions on their ability to pursue personal activities." *Berry*, 791 F. Supp. at 1401. It concluded that "*on-call investigations* were substantially the same as *on-duty investigations*." *Id.* at 1402 (emphasis added). The district court did not compare on-call waiting time to regular duty, however. Although we held in *Owens* that a court's inquiry is not limited to a specific set of factors, *see* 971 F.2d at 351 (list is illustrative, not exhaustive), we hold that inquiry into the similarity of on-call duties and regular duties is improper because the coroners are compensated for on-call investigations.

The district court relied on *Townsend v. Mercy Hosp. of Pittsburgh*, 862 F.2d 1009 (3rd Cir. 1988), to conclude that the similarity between investigations on-call and on-duty was relevant. In *Townsend*, the court addressed the issue of whether operating room personnel's on-call waiting time was compensable at one and one-half times the regular hourly rate. The hospital paid personnel one and one-half the regular hourly rate for actual work done while on-call, but only one and one-half the minimum wage rate for on-call waiting time. The court compared "the duties performed during the 'non-productive' periods on the on-call shift," *i.e.*, on-call waiting time, to "the duties performed by the operating room personnel during the regular shifts." *Id.* at 1012. Because of the substantial and qualitative difference between regular duty and on-call waiting time, the court held on-call waiting time was not compensable at the regular hourly rate. *Id.*

The district court in this case misconstrued the pertinent inquiry regarding similarity of duties. The Court in *Skidmore v. Swift & Co.*, 323 U.S. 134, 89 L. Ed. 124, 65 S. Ct. 161 (1944), stated that consideration of the nature of the service and its relation to the *on-call waiting time* is relevant in determining whether on-call waiting time is compensable. *See Id.* at 137.

The *Townsend* court's consideration of the similarity between regular duty and non-productive, on-call waiting time is in accord with *Skidmore*. However, in this case, the district court compared actual work conducted on-call with regular on-duty work to conclude merely that coroners' on-call investigations are substantially the same work as on-duty investigations. This conclusion is irrelevant. The coroners are paid a guaranteed minimum for actual work conducted on-call at a rate of one and one-half times the regular hourly rate. At issue here is what compensation is required for *on-call waiting time*. Thus, the relevant inquiry is whether on-call waiting time is substantially similar to regular on-duty work.

While on-call, coroners have participated in hobbies, entertained friends and family, went on outings, read, watched television, and slept. The record does not reflect that they did any of these activities while on duty. Consequently, we conclude on-call waiting time is not substantially similar to regular on-duty work conducted at the Coroner's Office.

2. Required Response Time

The proper inquiry regarding required response time is "whether a fixed time limit for response [is] unduly restrictive." *Owens*, 971 F.2d at 351. The district court found "that there was no explicit response time required for a coroner to report to the scene of a death, and there was no specific response time to initiate a telephone investigation of a coroner's case." *Berry*, 791 F.2d at 1403. The district court did find, however, that coroners are required to respond to a page or telephone call reporting a death within fifteen minutes. *Id.* Further, it noted that in actual practice, coroners initiate investigations "as soon as possible." *Id.*

We have not established what constitutes an unduly restrictive response time. However, other courts have held that on-call waiting time was not compensable even though employees were required to respond, in person at the employer's premises, within approximately twenty minutes of receiving a page or telephone call. *See Armitage v. City of Emporia, Kan.*, 982 F.2d 430, 432-33 (10th Cir. 1992); *Bright*, 934 F.2d at 676; *Norton*

v. Worthen Van Serv., Inc., 839 F.2d 653, 654 (10th Cir. 1988). *But see Renfro v. City of Emporia, Kan.*, 948 F.2d 1529, 1532 (10th Cir. 1991) (twenty minute response time supports holding that on-call time is compensable), *cert. dismissed*, _____ U.S. _____, 112 S. Ct. 1310, 117 L.Ed.2nd 510 (1992). In this case, the only required response time is fifteen minutes to answer a page or telephone call, not in person or at the employer's premises, but by telephone or two-way radio. This required response is substantially different than being required to return to the employer's premises within twenty minutes. We conclude the required response by telephone or two-way radio within fifteen minutes is not a factor prohibiting the coroner's personal pursuits.

3. Use of Pager to Ease Restrictions

Regarding the coroners' ability to use pagers, the district court concluded "that the pagers were not 100% reliable and so their benefit, if any, to [the coroners] was only partial." *Berry*, 791 F. Supp. at 1407. However, the proper inquiry is "whether use of a pager [can] ease restrictions," *Owens*, 971 F.2d at 351, not whether the pager is 100% reliable. In this case, the coroners are not required to use a pager, but may voluntarily do so. By being able to use a pager, the coroners are not restricted to areas with a telephone or two-way radio. As a result, we conclude the coroners' use of pagers eases restrictions while on-call and permits them to more easily pursue personal activities.

4. Ability to Trade On-Call Shifts

The district court found that "in actual practice, the [coroners] seldom voluntarily traded on-call shifts," and found the primary reason for seldom trading was the coroners' "unwillingness to impose on each other's off-duty time." *Berry*, 791 F. Supp. at 1409. Based on these findings, the district court concluded "with so few coroners, there was little to be gained by trading on-call time." *Id.*

The proper inquiry is "whether the on-call employee [can] *easily* trade on-call responsibilities." *Owens*, 971 F.2d at 351 (emphasis added). There is no evidence that the coroners are

unable to trade shifts or have had difficulty at any time trading shifts. Conversely, the evidence shows coroners have traded shifts without difficulty, including on special occasions and to maintain secondary employment such as teaching. *See Berry*, 791 F. Supp. at 1409. Because there is no policy against trading shifts and no evidence to support a conclusion that trading shifts is difficult, we conclude the coroners can easily trade shifts. The fact that coroners seldom are willing to impose upon one another's off-duty time does not mean they cannot easily trade shifts if they seek to trade.

5. Excessive Geographical Limitations

Only if geographical restrictions are excessive is the employee restrained from engaging in personal activities. *See Owens*, 971 F.2d at 351. As a practical matter, if an employee is not required to remain on the employer's premises, geographical restrictions are imposed according to the required response time for an employee to return to the employer's premises. *See Armitage*, 982 F.2d at 432 (employee required to respond to employer's premises within twenty minutes); *Bright*, 934 F.2d at 676 (same); *Norton*, 839 F.2d at 654 (same). In such cases, the employee while on-call may only travel that distance from the employer's premises which can be traveled safely within the required response time.

As previously noted, the only required response time imposed upon the coroners is a fifteen minute response by telephone or two-way radio to a death report. Because the coroner is not required to return to the employer's premises, the fifteen minute response time does not impose any geographical limitation except that the coroner must be within fifteen minutes of a telephone or two-way radio. We conclude this restriction is not an excessive geographical restriction.

6. Personal Activities of the Coroners

The district court erred in concluding the coroners were engaged to wait because they cannot pursue certain personal activities. The district court found:

> They did not engage in activities which would make it difficult for them to respond promptly to a call. They did

> not pursue social activities with their families while on call, both because of the restriction on having family members in their County vehicles and because they could be interrupted. They limited their consumption of alcohol to the extent that they wanted to present a sober image if they had contact with the public. For the same reason they refrained from strenuous or dirty activities like yard work or car maintenance while on-call, in order to be presentable to the public in case they would have to report in person to a death scene.

Berry, 791 F. Supp. at 1412. Based on these findings, the district court concluded, "while on-call [the coroners] remained in a state of readiness to work; they were engaged to wait." *Id.* at 1413.

The inquiry, however, is not whether the coroners are prevented from participating in certain personal activities, but whether they actually engage in personal activities during on-call shifts. *Owens*, 971 F.2d at 351. As previously noted, an employee need not have "the same flexibility or freedom as he would if not on call" to engage in personal activities in order to conclude that he can use on-call time effectively for his own purposes. *Id.* at 350-51 (internal quotation omitted). Although the coroners are unable to engage in certain pursuits, it is undisputed that while on-call coroners have actually been able to socialize with friends and family, dine out, shop, read, watch television and enjoy hobbies such as gardening, working on antique cars, leather crafts and photography. Also, two coroners actually held secondary employment. Siebe, although not a party to this appeal, had firewood and machine shop businesses when he was a deputy coroner, and Berry taught classes at a local community college and answered calls for a voluntary fire department of which he was Battalion Chief. *Berry*, 791 F. Supp. at 1412.

As the district court noted, the ability of coroners to maintain secondary employment while on-call undermines the coroners'

position that they are unable to actually pursue personal activities. *Id.* at 1409. Furthermore, other courts have held employees were able to use their on-call time effectively for their own personal purposes where they could pursue personal activities similar to those pursued by the coroners while on-call. *See Bright*, 934 F.2d at 676 (employee able to carry on personal activities at home, shop and dine out); *Halferty v. Pulse Drug Co., Inc.*, 864 F.2d 1185, 1189 (5th Cir. 1989) (employee able to visit friends, entertain guests, sleep, watch television, do laundry and babysit); *Norton*, 839 F.2d at 655 (employees able to spend time at friends' homes, church, laundromats, restaurants, pool halls, and local gymnasium, and to pursue hobbies); *but see Renfro*; 948 F.2d at 1532 (holding on-call time compensable even though employees participated in sports activities, socialized, attended business meetings, shopped, dined out, babysat and performed household chores). We conclude the coroners have actually engaged in personal activities, thereby effectively using on-call time for their own personal purposes.

7. Frequency of Calls

Perhaps the only factor to support a conclusion that on-call waiting time is compensable in this case is the frequency of calls. Although the parties disagree as to the frequency of calls resulting in call-backs, they agree that the frequency of all death reports while on-call have been approximately one every 3.97 hours in 1987; one every 3.82 hours in 1988; one every 8.33 hours in 1989; one every 8.19 hours in 1990; and one every 7.93 hours in 1991. Relying on these statistics, the coroners receive a death report, on average, once every 6.45 hours.[8]

The district court relied heavily on *Renfro*, 948 F.2d at 1529, to conclude that a crucial factor in determining compensability is the frequency of calls. *See Berry*, 791 F. Supp. at 1404. In

[8] The district court found "the average frequency of calls requiring a coroner to respond by telephone while on-call was one per 4 hours on-call." *Berry v. Sonoma County*, 791 F. Supp. 1395, 1405 (N.D. Cal. 1992). In their briefing, the parties agreed to statistics which make the district court's conclusion implausible. Consequently, we rely on the statistics offered by the parties for our analysis.

Renfro, the court held on-call waiting time compensable where fire fighters had to report to the stationhouse within twenty minutes of being paged or be subject to discipline, received three to five calls per twenty-four hour on-call period, and had difficulty securing secondary employment and trading on-call shifts. *See Renfro* at 1534-1536. In distinguishing *Renfro* from its previous cases holding that on-call waiting time was not compensable, *see Boehm v. Kansas City Power and Light Co.*, 868 F.2d 1182, 1185 (10th Cir. 1989); *Norton*, 839 F.2d at 656, the court relied on the frequency of call-backs and the nature of the fire fighters' employment. It concluded that because fire fighters had to lie "in wait for emergencies" in order to respond "alert and ready to protect the community" as frequently as three to five times in a twenty-four hour shift, they could not use on-call time effectively for their own personal pursuits. *Renfro*, 948 F.2d at 1538.

The coroners' case can be easily distinguished from *Renfro*. The coroners have no required response time in which they must return to the employer's premises, and as a result, they have no geographical limitations and are not subject to discipline. Also, the coroners have not shown any difficulty trading shifts and have been able to maintain secondary employment. Furthermore, the nature of the coroners' employment does not require response to emergencies in progress as does a fire fighter's employment. *See Armitage*, 982 F.2d at 432 (distinguishing *Renfro* because detectives required to respond to crimes already committed not emergencies in progress).

Although the frequency of calls arguably supports a conclusion that coroners are engaged to wait, all other factors, including an absence of an on-premises living requirement, geographical limitations, response time, and an ability to easily trade shifts and to actually pursue personal activities support a conclusion that the coroners are free to pursue personal activities while on-call. Because this court has held that no one factor is dispositive, *Owens*, 971 F.2d at 351, and all but one of the relevant factors weigh in favor of concluding the coroners are

free to pursue personal activities, we conclude that the coroners can effectively use on-call time for personal pursuits.

Sonoma County also argues application of the FLSA to it violates the Tenth Amendment. Because Sonoma County raised this issue for the first time on appeal, we decline to review it. *In Re Wind Power Sys., Inc.*, 841 F.2d 288, 290 n.1 (9th Cir. 1988) ("As a general rule, the court of appeals does not consider issues raised for the first time on appeal."). Additionally, because we conclude the district court erred in granting judgment for the coroners, we need not address the coroners' cross-appeal challenging the district court's denial of liquidated damages pursuant to 29 U.S.C. § 216(b) and rejection of a three year statute of limitations pursuant to 29 U.S.C. § 255(a) and requesting attorneys fees.

CONCLUSION

Despite the district court's conclusion that the coroners must be compensated for on-call waiting time, a majority of its findings support the opposite conclusion. The two predominant factors to be analyzed in determining whether on-call waiting time is compensable weigh in favor of reversing the district court. The existence of express and constructive agreements and collective bargaining agreements evidence the coroners' agreement to Sonoma County's overtime compensation policy. Further, the district court's findings support the conclusion that coroners are able to effectively use on-call time for personal pursuits. As a result, we hold the time that coroners spend waiting on-call for actual work is not compensable under the FLSA.

REVERSED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-89-4476 SAW (FSL)

GREGORY BERRY ET AL.,

PLAINTIFFS

v.

SONOMA COUNTY ET AL.,

DEFENDANTS

February 28, 1992

Motion to Reconsider May 1, 1992.

MEMORANDUM OPINION

F. STEELE LANGFORD, Chief Magistrate Judge

This matter was tried before the court November 12-16, 1991. Appearing for plaintiffs was W. David Holsberry, Esq. of Davis, Cowell and Bowe, San Francisco. Appearing for defendants was Patrick G. Grattan, Esq. and Steven C. Mitchell, Esq. of Geary, Shea, O'Donnell and Grattan, Santa Rosa. Both sides presented exhibits and testimony of witnesses. After the trial concluded, counsel submitted post-trial briefs and rebuttal briefs and proposed findings of fact and conclusions of law. The case was submitted December 20, 1991.

The evidence having been considered and good cause appearing, this court hereby finds for plaintiffs. Plaintiffs shall submit a cost bill and declarations supporting an award of attorney's fees. The court does not award liquidated damages.

FACTUAL BACKGROUND

The question presented in this case is whether the Fair Labor Standards Act of 1938 ("the FLSA"), 29 U.S.C. §§ 201 *et seq.*, requires defendants to pay overtime compensation to plaintiffs for each hour spent "on-call" from December 1986 to the present. Plaintiffs' claim for compensatory damages totals over $200,000. Liquidated damages would bring the amount claimed to over $400,000. This action was brought by Gregory Berry, Philip Marcus, Dennis McAllister and Francis Oravetz, current and former deputy coroners employed by the Sonoma County Sheriff's Department. Defendants are Sonoma County; Sonoma County Board of Supervisors; Richard Michaelson, Sonoma County Sheriff, and Janet Nicholas, James Harberson, Tim Smith, Nick Esposti, and Ernest Carpenter, members of the Board of Supervisors.

Plaintiffs are law enforcement employees of the Sonoma County Sheriff's Department.[1] At all times relevant to this litigation, the Sheriff's Department has employed only three

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[1] "Law enforcement activities" is defined in 29 C.F.R. § 553.211.

deputy coroners at any one time. Although the Coroner's Office's regular business hours are Monday through Friday, 8 a.m. to 5 p.m., coroners are required by California statute to respond to certain reported deaths twenty-four hours a day, seven days a week. *See* Cal.Gov't Code §§ 27491 *et seq.*; Cal. Health & Safety Code §§ 10250 *et seq.*

Pursuant to 29 U.S.C. § 207(k), the Sonoma County Sheriff's Department has established a fourteen-day work period. In each work period, plaintiffs are regularly scheduled to work eight ten-hour shifts, for a total of eighty hours. In addition, the coroners are required as a condition of their employment, to work many extra hours on an "on-call" basis to fulfill the Coroner's Office's statutory obligation to be available at all times. One coroner is always on-call during after-business hours.

For example, under the schedule in place since October, 1990, approximately 71 hours per week were covered by the coroners on an on-call basis. These 71 hours were divided among the then-current coroners as follows: Berry worked 30 hours per week on-call, McAllister worked 20, and Oravetz worked 21.[2]

In accordance with the FLSA, the County pays the coroners overtime compensation, at a rate of one and one-half times their regular pay, for all hours worked in excess of eighty-six hours per work period. *See* 29 U.S.C. § 207(k); 29 C.F.R. § 553.230(c). Plaintiffs receive overtime pay for all hours actually *worked* during their on-call time, but receive no specified compensation for each hour spent on-call, but not working.

The precise manner in which the coroners are required to conduct their duties while on-call is disputed. It is safe to say that when certain categories of deaths are reported to the

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[2] The fourth plaintiff, Marcus, left the employ of the Coroner's Office in November 1988, Berry left in September, 1991.

Coroner's Office after hours, the Sheriff's Department dispatcher contacts the on-call deputy coroner.[3] That coroner must be available by pager, telephone or the two-way radio in the coroner's county vehicle to respond to any such inquiry or death report. The coroner is often able to answer these inquiries and handle investigations over the telephone, in the same way that most investigations are handled on-duty, as well. He is guaranteed a minimum of one hour's overtime compensation for on-call time spent on the telephone. Some reports require the coroner to "call back," i.e. report in person to the Coroner's Office in Santa Rosa or to the death scene itself. Although the parties dispute the degree of flexibility the coroners have to deal with calls received during on-call hours, at a minimum it can be said that the frequency and unpredictability of these calls circumscribes the coroners' ability to participate in personal activities and often disrupts their sleep.

Plaintiffs contend that because of the excessive restrictions on their freedom to engage in personal pursuits during their on-call hours, these hours count as "hours worked" under the FLSA. Accordingly, they urge the court to award them backpay for *all* hours worked on-call, liquidated damages, and attorney's fees. Defendants counter that under the circumstances of this case, plaintiffs are entitled to compensation only for on-call hours actually spent responding to calls, and that, in fact, plaintiffs are compensated for being on-call by the 5% premium pay negotiated by the parties.

PROCEDURAL BACKGROUND

The District Court denied the parties' cross-motions for summary judgment, finding disputed facts relating to the flexibility with which the coroners can contend with their on-call responsibilities, i.e.: To what extent the coroners can and do engage in personal pursuits during on-call hours; the amount of time

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[3] Section 27491 of the California Government Code describes those deaths requiring a coroner inquiry. Generally speaking, the Coroner must investigate all violent, sudden, unusual, and unattended deaths. *Id.*

coroners have to respond to calls; the ease with which they can trade on-call responsibilities; whether they may transport family members in their county vehicles, or whether family members must travel in separate cars; whether they must remain in Sonoma County; the number and frequency of miscellaneous work-related calls they receive which are not reflected in the Coroner's Office statistics; whether plaintiffs' on-call duties are similar to and as demanding as their regular duties; the frequency with which they are "called back" to a death site or to the Coroner's Office.

The court also found disputed material issues relating to damages. Assuming that the FLSA requires defendants to pay plaintiffs backpay for all on-call time, the parties dispute whether defendants "wilfully" violated the Act and whether their purported violation was committed in bad faith. The statute of limitations for "wilful" violations of the Act is three years, but only two years for non-wilful violations. 29 U.S.C. § 255(a). In addition to backpay, employers in violation of the FLSA must pay liquidated damages in an amount equal to the unpaid overtime compensation. 29 U.S.C. § 216(b), unless their violation of the Act was in "good faith." 29 U.S.C. § 259-260.

The District Court found genuine disputed issues related to defendants' wilfulness and bad faith in allegedly violating the FLSA.

With both sides ready for trial, they were referred by the District Court to a magistrate judge, and consented to proceed before the magistrate judge.

The case was tried before the court for five days, during which time the parties presented exhibits and the testimony of witnesses.

FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act (hereafter "FLSA") (29 U.S.C. § 207) provides federal standards for the protection of

workers, including the minimum wage, maximum hours, investigations, inspections, homework regulations, child labor, exemptions from required standards, student and handicapped workers and overtime compensation.

OVERTIME COMPENSATION

Guidance on the issue of when an employee should be compensated for on-call time is provided by 29 C.F.R. § 785.17 which provides:

> An employee who is required to remain on-call on the employer's premises or so close thereto that it cannot use the time effectively for its own purposes is working while "on-call." An employee who is not required to remain on the employer's premises but merely required to leave word at his home or with company officials where he may be reached is not working while on-call.

Further guidance is set forth in 5 C.F.R. § 551.431 (1989) which states:

(a) An employee will be considered on duty and time spent on standby duty shall be considered hours of work if:

> (1) The employee is restricted to an agency's premises, or so close thereto that the employees cannot use the time effectively for his or her own purposes; or
>
> (2) The employee, although not restricted to the agency's premises:
>
> (i) Is restricted to his or her living quarters or designated post of duty;
>
> (ii) Has his or her activities substantially limited; and
>
> (iii) Is required to remain in a state of readiness to perform work.

(b) An employee will be considered off duty and time spent in an on-call status shall not be considered hours of work if:

(1) The employee is allowed to leave a telephone number or to carry an electronic device for the purpose of being contacted, even though the employee is required to remain within a reasonable call-back radius, or;

(2) The employee is allowed to make arrangements such that any work which may arise during the on-call period will be performed by another person.

and furthermore, 29 C.F.R. § 553.221(d) (1989) provides, in pertinent part:

. . . where the conditions placed on the employee's activities are so restricted that the employee cannot use the time effectively for personal pursuits, such time spent on-call is compensable.

PUBLIC EMPLOYEES: GARCIA DECISION

The United States Supreme Court held in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016, (1985), that the FLSA applied to local government entities. In general, the FLSA requires that employers pay overtime compensation to employees for hours worked in excess of forty hours per work week. 29 U.S.C. § 207(a). Because of their peculiar work schedules, however, the FLSA has established a special set of rules for fire protection and law enforcement employees. *See* 29 U.S.C. § 207(k).

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if-

(1) In a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) In the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty in which the aggregate exceed the number of hours which bears the same ration to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in Clause (B) of paragraph (1) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

ANALYSIS

The issue of overtime compensation for on-call work is a matter of first impression in this District and has not been considered comprehensively in the U.S. Court of Appeals for the Ninth Circuit. In addition, plaintiffs raise two issues which are apparently unique in this area of inquiry: the issue of work-related *telephone* interruptions during on-call time and the issue of the unpredictability of calls, either calls requiring a telephone response or calls requiring an in-person response.

After considering the record, the pleadings and the applicable law, the court has determined the following to be the critical factors in this case:

1) Whether plaintiffs' on-call duties are similar to and as demanding as their regular duties;

2) Required response time;

3) Frequency of calls during on-call hours;

4) Number and frequency of miscellaneous work-related calls received which are not reflected in the Coroner's Office statistics;

5) Geographic restrictions

6) Use of a pager;

7) Ease with which on-call employees can trade on-call responsibilities;

8) Extent of personal activities engaged in during on-call time;

9) Whether coroner investigators may transport family members in their county vehicles, or whether family members must travel in separate cars;

10) Existence and provisions of any agreement between the parties governing on-call work;

11) County's wilfulness or bad faith in violating the FLSA;

CONCLUSIONS OF LAW

1) Whether Plaintiffs' On-Call Duties are Similar to and as Demanding as their Regular Duties

If plaintiffs' on-call duties are similar to and as demanding as their regular duties, then this, along with other factors, would tend to show restrictions on their ability to pursue personal activities and that their on-call time is compensable. *Townsend v. Mercy Hosp. of Pittsburgh*, 862 F.2d 1009 (3rd Cir. 1988).

In the *Townsend* case, plaintiffs were operating room personnel who worked standby shifts in addition to their regular shifts. They were paid at their regular overtime rate for hours actually worked, that is, if they were called in to assist at surgery. They were paid minimum wage at time and a half for the hours spent on standby. They were required to be present on the employer's premises but they were permitted to read, watch television and sleep while on-call. The court held that they were only working at their regular job while they were assisting in the operating room and that their employer could compensate them at the lower rate of minimum wage for standby time. The court found that the actual work done on-call was substantially the same as work done during regular hours. *Id.* at 1012.

Plaintiffs testified to the components of a death investigation into the circumstances, cause and manner of death, as required by § 27491 of the California Government Code. Coroners arrange for identification of the body, notify family members of the death, refer them for appropriate social services, contact

transplant services regarding potential organ donations, and inventory and secure property, until it may be released to a responsible person. Coroners also secure a copy of the decedent's will and sometimes file it with the County Clerk. They also cooperate with other public officers, including the Public Guardian, and other health and law enforcement personnel who may be involved in the investigation. The coroner arranges for an autopsy in cases of suspected homicide, suicide, traffic death or medically unattended death. The coroner prepares a report, which varies in length. A typical investigation may be concluded in fifteen minutes or may require the coroner's time over several months until it is concluded, and the coroner signs the death certificate.

The deputy coroner also prepares a brief preliminary report on a death which is not reportable under the Government Code, i.e. the death of someone who has been under a physician's care within the past twenty days, or in a hospital within the past twenty-four hours, who dies of natural causes. In such a case, called a "no case," the attending physician signs the death certificate. (Pl. Ex. 1—Policy and Procedure Manual, Pl. Ex. 2—Coroner Office Protocol, Testimony of Oravetz).

Defendants in this case contend that on-call investigations are not as comprehensive as on-duty investigations. They claim that the deputy coroners simply stabilize a case as best they can and complete their investigation during their next on-duty shift. Defendants and plaintiffs alike testified that the deputy coroners can only telephone doctors' offices and many other agencies during normal business hours, not between midnight and 7 a.m., when three quarters of all on-call hours fall. (Oravetz testimony).

Plaintiffs here claim that they conduct on-call investigations as thoroughly and completely as on-duty investigations. On-call time and on-duty time are, for all practical purposes, interchangeable. When an on-duty deputy was absent either for a day or for a lengthy period, his shift was simply converted to on-call and handled by the remaining deputies. In this regard, a shift on which all hours would normally be compensable,

would be handled on an on-call basis. Also undisputed was the fact that deputies occasionally worked at home while on duty and occasionally worked at the office while on-call, sometimes even sleeping there. Generally, however, on-call investigations would be handled from outside the Coroner's Office, most often from the deputy coroners' homes, while on-duty investigations were handled from the Coroner's Office.

The testimony was uniform that in comparing an on-call investigation with an on-duty investigation the deputy had the same responsibility and discretion, observed the same response time, and conducted investigations to the fullest extent possible at the time the death report was received.

As with on-duty investigations, a majority of on-call investigations could be conducted by telephone and some required response to a death scene. Moreover, all other coroner responsibilities were sometimes conducted on-call: securing property, notifying relatives, arranging organ donations, releasing bodies, and performing other morgue responsibilities. Deputies called hospitals and nursing homes, relatives, funeral homes and anyone else necessary to secure property and the body of the deceased. Although some offices could not be contacted outside the ordinary business day, most of the entities the deputies dealt with were also on a twenty-four hour a day schedule or else had to be contacted, regardless of the hour (e.g. relatives).

The court concludes that on-call investigations were substantially the same as on-duty investigations, with the exception that on-call investigations were usually handled from outside the Coroner's Office, most often the coroner's home, while on-duty investigations were handled from the Coroner's Office. Both on-duty investigations and on-call investigations were most often conducted by telephone.

2) The Required Response Time

The response time within which an on-call employee must report back to work may so restrict an employee that the time spent on-call is for the benefit of the employer and therefor

compensable. *Renfro v. Emporia*, 729 F. Supp. 747 at 748-49 (D.Kansas 1990[4]); Dept. of Labor, Wage and Hour Div., Ltr. Rul. No. 1695 (Nov. 15, 1988); Dept. of Labor, Wage and Hour Div., Ltr. Rul. (No Number Assigned) (March 11, 1987).

In the *Renfro* case, city firefighters, in addition to their on-duty schedule, also appeared on a mandatory callback list for each 24-hour period following a regularly scheduled tour of duty. During this on-call period, the firefighters were not required to remain on the stationhouse premises. However, they were required to carry pagers and return to work within twenty minutes if called or be subject to discipline. Firefighters were paid overtime only when they were actually called back to duty and not for the time spent on-call.

The Court of Appeals affirmed the District Court, holding that the required response time of twenty minutes, combined with the frequency of calls, an average of 3-5 per twenty-four hour on-call shift, made it impossible for the firefighters to use their on-call time effectively for their own pursuits. Therefore, the on-call time was work time and should be compensated.

Defendants claim that the plaintiffs in this case have *no* required response time and therefore are not in the same position as the firefighters in *Renfro*.

The plaintiffs, however, claim that they are required to respond as soon as possible, and that Sheriff's Department policy is that "a deputy coroner shall be dispatched immediately" (Sheriff's Dept. Policy and Procedure Manual § 21.29 Pl. Ex. 1). In fact, they respond to Dispatch within fifteen minutes. This response is usually by telephone. Although Chief Deputy Coroner Siebe testified that there was never a specific response time for deputy coroners, the evidence was that the plaintiffs each responded as soon as possible to calls or pages from the dispatcher.

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[4] The Tenth Circuit's decision in *Renfro v. Emporia* was officially reported during the course of this trial. Plaintiffs referred to this decision in their post-trial briefs. Some of the citations in the course of this memorandum decision refer to the earlier case in the District Court of Kansas.

Both Oravetz and McAllister testified that Siebe specifically instructed them to respond to calls as soon as possible. Obviously, since most of the on-call death reports were initiated by a telephone call to the deputy's home by Dispatch, the telephone would have to be answered immediately in order to obtain the initial preliminary information. In this regard, the interruption was immediate.

When the contact was by pager, the testimony was again uniform that the deputies' normal practice was to telephone the dispatcher as soon as the deputy could get to a telephone. Under both circumstances, the normal practice of the deputies was then immediately to commence the necessary investigation. Plaintiffs claim that the lack of any specific response time imparted no freedom to them. Responses were made as soon as possible and in the same manner as if the death report was received on duty.

The deputies testified that when they had to respond in person to the scene of a death, they responded as quickly as possible. They testified that they did so because often emergency personnel, rescue squad, fire department or police, could only leave the scene and continue with other duties after the coroner had conducted his part of the investigation and authorized removal of the body. Delay in responding by the coroner could mean that a wrecked car would remain blocking a freeway until he could arrive and authorize the removal of the body from the wreck so the car could be removed.

The testimony was uniform that coroners responded as soon as possible, by telephone or in person, whichever was appropriate. There was no testimony that any coroner was ever disciplined for a delayed response.

This court concludes that the policy of the department was that calls by Dispatch be returned within fifteen minutes and that the coroner report to the scene of a death, if required, as soon as possible. There was no official required response time for reporting in person to a death scene and there was no testimony regarding discipline for any coroner who delayed in responding, either to Dispatch, or to the scene of a death.

(Siebe testimony) The Court therefore finds that there was no explicit response time required for a coroner to report to the scene of a death, and there was no specific response time to initiate a telephone investigation of a coroner's case, only a fifteen minute time limit for responding to Dispatch when notified of a death. However, the actual practice in the Coroner's Office was that investigators initiate an investigation as soon as possible, except for nursing home deaths, which could be investigated the next on-duty shift.

3) The Frequency of Calls During On-Call Hours

The frequency of calls may so restrict an on-call employee that the time is spent for the employer's benefit and is therefore compensable. *Renfro v. Emporia*, 729 F.Supp. 747, 748, 751 (D.C.Kan. 1990), aff'd 948 F.2d 1529 (10th Cir. 1991) certiorari dismissed, _____ U.S. _____, 112 S.Ct. 1310, 117 L.Ed.2nd 510 (1992); *Brock v. El Paso Natural Gas Co.*, 826 F.2d 369, 373 (5th Cir. 1987); *Clay v. Winona*, 753 F.Supp. 624, 629 (N.D.Miss. 1990); Dept. of Labor, Wage and Hour Div., Ltr. Rul. No. 1695 (Nov. 15, 1988); Dept. of Labor, Wage and Hour Div., Ltr. Rul. No. 1693 (Sept. 8, 1988).

In the case of *Renfro v. Emporia*, the appellate court affirmed the finding of the lower court that the calls were frequent enough that on-call time *was* compensable. The Court found that, although some firefighters had secondary employment and pursued some personal activities, for most firefighters, secondary employment and personal activities were difficult, if not impossible. *Id.* at 1535.

Firefighters testified that on occasion a firefighter must answer 12-13 calls in one day and that on the average, on-call firefighters receive 3-5 calls per twenty-four hour on-call shift (729 F.Supp. at 751).

The employer contended that firefighters had traded their on-call time with other firefighters and that while on-call firefighters had participated in sports activities, socialized with friends and relatives, attended business meetings, gone shopping, gone out to eat, babysitted and performed maintenance or other activities around their homes.

Nevertheless, the District Court held, and the Court of Appeals affirmed, that the firefighters' on-call time was compensable under the FLSA. The Court of Appeals noted that the District Court had found two important distinctions in the firefighters' on-call duties: the frequency of callbacks, and required response time. They were called back to the station an average of 3-5 times per on-call shift, and they were required to report to the stationhouse within twenty minutes of the call, alert and ready to protect the community. If they were late or missed a callback, they were subject to discipline, which might ultimately result in termination 948 F.2d at 1531. The Court held that the firefighters' on-call time was so restricted by their employer that they were "engaged to wait" and therefore entitled to compensation for it under the FLSA. *Id.* at 1538.

In the case of *Brock v. El Paso Natural Gas Co.*, 826 F.2d 369 (5th Cir. 1987), calls were so *infrequent* that the court determined that on-call hours were not "hours worked" under the FLSA, and therefore not compensable. Plaintiffs were employees of a natural gas pipeline company, employed at satellite stations along the pipeline route. One employee was on-call for each after-hours shift, to protect against vandalism and theft. Each employee's home was equipped with an alarm which sounded if there was trouble at the satellite station. The testimony was that the employees were seldom called and that the required response time was not unduly restrictive.

In the case of *Clay v. Winona*, 753 F. Supp. 624 (N.D. Miss. 1990), the frequency of calls was also less than that required to make on-call time compensable. Plaintiffs were firefighters who sued to recover overtime pay for standby shifts. The District Court granted summary judgment to the employer, finding that the firefighters were not entitled to overtime for standby shifts: they could use standby time for their own purposes, they were aware that they would not be paid for standby duty when they were hired, and they were called back less than once per twenty-four hour standby shift, even though there was a five minute response time requirement.

Plaintiffs believe their circumstances to be similar to the firefighters' in *Renfro*. Crucial factors were frequency of callbacks and response time—3-5 per on-call period, with a twenty minute time limit to report back to the firehouse.

During the periods covered by this action, deaths were reported on a range from once every 3.82 hours (1988) to once every 8.33 hours (1989).

Defendants seek to emphasize that the occasions on which an on-call deputy is required to leave his residence to respond to a death scene are infrequent. Plaintiffs claim that this argument misses the point for two reasons. First, regardless of the frequency of on-site investigations, the on-call deputy must be available and prepared to respond. Second, the fact that most investigations are conducted by telephone is of only minor relevance. The evidence was undisputed that on-call deputies are frequently interrupted, which is the significant inquiry. In this regard, a majority of *all* investigations conducted by the Coroner's Office are done by telephone, rather than by responding to a death scene. The investigations are no less important or significant simply because they are conducted by telephone. *On-duty* investigations are also most often conducted by telephone, albeit at the Coroner's Office, not the deputy's home.

Defendants specify that the vast majority of responses require making one or more phone calls and that the response time requirement here is much less restrictive than in other cases. The frequency of calls to a coroner investigator was established at 1-2 per every 8 hours of on-call time. During one two-year period the rate rose to once every 3-4 hours, when coroners were required to initiate immediate investigation of deaths of patients in nursing homes. When the Coroner's Office changed its policy to allow those deaths to be investigated the next on-duty shift, the rate fell for a time to one death per 8 hours on-call.

The frequency of occasions when a coroner investigator is required to respond back to a death scene was established at various levels of frequency: 1) once every 75 hours, or approximately once every ten shifts. 2) When Chief Deputy Coroner

Siebe included instances where the initial response was made during a regular duty shift but the response required the coroner investigator to remain at the scene into his on-call shift, the frequency was once every 59 hours for 1990. (Siebe testimony) These are the most recent statistics. 3) In earlier reports Siebe has estimated the in-person response rate to be as often as once in 17 hours on-call.

Since defendants kept the statistics, this court adopts the statistics most favorable to plaintiffs.

This court concludes that the average frequency of calls requiring a coroner to respond by telephone while on-call was one per 4 hours on-call. The average frequency of calls requiring an in-person response by the on-call coroner was one per 17 hours on-call.

The plaintiffs in *Renfro* were on-call for twenty-four hours at a time, during which they were called back to the stationhouse an average of 3-5 times. If we triple the numbers of calls for the coroners' eight-hour on-call shifts, and compare them to the firefighters in *Renfro*, we see that the coroners, in twenty-four hours on-call, would initiate 3-6 telephone investigations and one and one-half in-person investigations.

Defendants would argue that the plaintiffs in *Renfro* were required to respond *in person* to a call, where the plaintiffs in this case usually respond by telephone. This argument misses the point. The majority of *on-duty* investigations are also conducted by telephone. When an investigator made telephone calls from his home to investigate a death, he was doing exactly the same work he would have been doing if he were on-duty in the Coroner's Office.

Comparing the numbers of responses, we see that the firefighters in *Renfro* responded 3-5 times per twenty-four hours and the coroners in this case in an average twenty-four hours on-call, were called to work to initiate a telephone investigation 3-6 times, and an in-person investigation one and one-half times. This is equivalent to the frequency of responses in the *Renfro* case.

4) The Number and Frequency of Miscellaneous Work-Related Calls They Receive Which are not Reflected in the Coronor's Office Statistics

The official statistics may not reflect the actual number of calls made or received by the coroner investigators, therefore the number of interruptions may be greater.

Plaintiffs assert that the defendants' statistics are not accurate reflections of *interruptions*. It was undisputed that the plaintiffs did not record every work-related telephone call received while on call nor did they seek overtime for each call. The testimony was uncontradicted that, in general, calls were recorded and overtime sought only when an investigation was commenced and a death file was opened. On-call telephone inquiries from hospitals, police, co-workers, the media and the removal service are not recorded, and are not reflected in the statistics, but nonetheless constitute interruptions to the on-call deputy coroner.

Plaintiffs disagree with defendants' interpretation of the Coroner's Office statistics on calls. Plaintiffs say they only "charge" the County for the first call which initiates a death investigation. Plaintiffs say that each call for which they charge the County also represents additional calls connected with the same investigation, for which they do not charge. Plaintiffs' Berry and McAllister's records for their County-provided work telephones show many on-call, work-related telephone calls. McAllister was on call during November 1989 through January 1990 on 17 occasions. During this period he initiated 45 investigations. His telephone records from the period indicate that he initiated *244* work-related telephone calls from his home telephone. (Pl.Ex. 29) During the same period, Berry was on call on 46 occasions. His telephone records indicate that during this period he initiated *379* work-related telephone calls from his residence. (Pl.Ex. 30) As another example, in April, 1988, Berry was on call during 22 days and initiated 68 death investigations. During the same period he made approximately 254 telephone calls from his home. Obviously, the number of telephone calls is far greater than the number of investigations

initiated. Also, the telephone bill reflects only outgoing calls, not incoming calls. Plaintiffs say that the total number of calls gives a truer picture of the number of *interruptions*, and that the interruptions make it difficult or impossible for the coroners to use their on-call time for personal pursuits.

Plaintiffs also claim that the average figures do not give a true picture of the conditions under which the coroners worked. Death is unpredictable and the coroners never knew at what hour of the day or night a death would be reported to them. They would immediately initiate an investigation. The statistics also demonstrate the hazard of relying on "averages" as an indicator of interruptions. All of the plaintiffs' statistics indicate that during some on-call periods, they received numerous calls, and that on others they received none. Nonetheless, when a call would be received was unpredictable, and in order to perform his job in a professional manner, the deputy coroner had to be prepared and available to respond to any situation, whether it be multiple calls or no calls. At a minimum, however, even defendants' statistics demonstrate that the deputies knew it was statistically likely they would receive a death report at least once during an on-call period.

The Court concludes that the plaintiffs made and received telephone calls for which they did not charge the County, as reflected in the telephone bills for the County telephone lines installed in plaintiffs' homes. Few cases deal separately with the issue of interruptions of an employee's normal routine during on-call time, as distinct from the issue of frequency of calls.

In one such case, plaintiffs contended that interruptions by telephone and other kinds of calls were so often throughout the day and night as to seriously affect the employees' health. *Glenn v. Southern Cal. Edison Co.*, 187 F.2d 318 (9th Cir. 1951).

The plaintiffs in this case also claim that they do not sleep well, because of actual or anticipated interruptions. One coroner testified that he wakes up during the night to check the phone to be sure it is working. (McAllister testimony) Coroners also testified that days and nights on-call go by with no

interruptions at all. They claim that this very unpredictability prevents them from using their on-call time for their own purposes.

The plaintiffs have established, by their telephone records, that they initiated many more telephone calls than they charged to the County, and that the number of interruptions was greater than the number of death investigations initiated. The number of phone calls made and received by the deputies does not change the statistics on the number of times they were "called back" to work. The number of interruptions does, however, have an effect on their ability to use their time for their own pursuits.

5) Use of a Pager

Use of an electronic pager may lessen restrictions on an on-call employee by making it possible for the employee to be away from a telephone or two-way radio, therefore making his on-call time non-compensable. 5 C.F.R. § 551.431(b)(1) (1989) *See, e.g. Norton v. Worthen Van Service, Inc.*, 839 F.2d 653, 654 (10th Cir. 1988).

The plaintiffs in *Norton* were van drivers who transported railroad crews to and from their trains. The drivers generally worked shifts of eight to twelve hours a day and during that time they were required to be near enough to the employer's premises to be able to respond to calls within fifteen to twenty minutes. The drivers were, however, compensated for this waiting time if they received a call within two hours of their last call. This scheme was held to comply with the provisions of the FLSA and the drivers' on-call time was not compensable. *Id.*

Plaintiffs here complained that the pagers were not always reliable in all areas of the County. Thus, McAllister testified that he could not be reached at all in the vicinity of Bodega Bay, where he lives, and Berry testified that he could not be reached in the area of Calistoga, where he lives. However, this is contrary to Siebe's testimony that he was paged at the golf course in Bodega Bay and that he has paged the new coroner investigator, Iverson, at a golf course near Middletown, which

is well beyond Calistoga, in neighboring Lake County, where Iverson lives. Moreover, Undersheriff Moore, who wears a pager 24 hours per day, testified that the only time he has had a problem being paged is when he forgets to turn it on. In any event, if there are isolated canyons or areas where the pagers do not work, defendants contend that the coroner investigators should be able to identify those areas and adjust accordingly, presumably by using the two-way radios in their County vehicles or by staying close to a telephone.

Plaintiffs claim that they in effect did not have the benefit of wearing pagers because the pagers were not reliable. Each plaintiff as well as former Chief Deputy Coroner Dunham and Chief Deputy Coroner Siebe acknowledge that the pagers were not reliable. Siebe admitted that problems existed with the paging system in downtown Santa Rosa, on the coast, and in the hill area. Neither McAllister nor Berry could be paged at their own homes. Marcus refused to rely on the paging system because he did not trust it.

Under these circumstances, any freedom imparted to the deputies by the pagers was illusory, according to plaintiffs. If anything, the unreliable paging system caused the deputies to be *more* restricted in that to remain available, they had to be close to a telephone or coroner vehicle radio, and needed to inform Dispatch whenever they moved to a different location. The unreliability of the paging system is another factor in plaintiffs' favor.

This court concludes that the pagers were not 100% reliable and so their benefit, if any, to plaintiffs was only partial.

6) Geographical Restrictions on Employees' Movements

Most courts do not find that geographical restrictions alone render an employee's on-call time compensable. Such restrictions may, combined with other factors, such as frequency of calls and required response time, restrict an employee's ability to use on-call time for personal pursuits, and therefore make on-call time compensable.

For example, the employees in the *Rousseau* case were restricted to a barge, whether offshore, or docked, and could not

leave during their on-call time. Nevertheless, the court held that because of other factors, their on-call time was not compensable. The other factors included infrequency of calls and the ability to trade on-call duties with other employees. *Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245, 1248 (5th Cir. 1986).

If an on-call employee is restricted to a certain geographic area, due to required response time and/or frequency of calls, then his time may be so restricted that it is compensable 729 F. Supp. at 748-49.

In *Renfro*, where firefighters on-call time was found to be compensable, firefighters testified that due to the twenty minute response time requirement and the large number of callbacks they could not go out of town. *Id.*

Defendants claim that deputy coroners could and did leave Sonoma County while on-call. In fact, former coroner Berry lives on the County border, as he did while still a coroner and non-plaintiff coroner Iverson lives in neighboring Lake County. Only plaintiff Marcus lives within the central County area, the others living 45 minutes or more distant. Chief Deputy Coroner Siebe testified that any coroner could leave the County while on-call with permission. Plaintiffs in this case claim that they were restricted to Sonoma County (1600 square miles) and could only go to other counties with permission. Marcus was instructed to remain in the central county area. The deputy coroners testified that they normally remained at home while on call.

Except in unusual circumstances, the plaintiffs avoided travel while on-call because of their understanding that family members were prohibited from being in the coroner's vehicle, and the consequent need to take two vehicles for any kind of travel with the family, so as not to strand a family member if called to a death scene.

Although travel was not prohibited within the county, it was avoided because it could unnecessarily delay a response (e.g. Marcus testimony); because the pagers did not work in all

areas of the county (testimony of all plaintiffs); and because it was inconvenient to respond to calls and conduct a professional investigation from a phone booth or other location (e.g. Oravetz testimony).

In this regard, the ability to travel throughout the county, say the plaintiffs, was an illusory benefit. The evidence was that the on-call deputy rarely did so because of the inconvenience or possibility of being less available or delaying a response.

The deputies were not required to respond to the scene of a death within any definite time, and there was no record of any deputy ever being disciplined for responding too slowly. The only definite response requirement was a telephone call to Dispatch within fifteen minutes of notification of a death. However, the practice of the coroner investigators was to initiate an investigation immediately upon being notified of a death by Dispatch.

This court concludes that plaintiffs were specifically restricted to a very large area (Sonoma County), and that they were allowed to wear pagers which were not reliable in all areas of the County, including the areas near two of the plaintiffs' homes. They were required to respond by telephone within fifteen minutes of a call from Dispatch and they were to initiate their investigation as soon as possible. This required them to be within fifteen or twenty minutes of a telephone or two-way radio, which each plaintiff had in his County vehicle. This court concludes that the geographic restriction was only partial, in that plaintiffs could seldom if ever go into a neighboring County while on-call, due to the frequency of responses and the required response time.

7) The Ease With Which On-Call Employees Can Trade On-Call Responsibilities

If employees may easily trade on-call responsibilities, then they have more flexibility in using their off-duty time for personal pursuits which would be difficult or impossible to pursue on-call. If employees may be relieved of on-call responsibilities at their request, whether by trading with other employees or

otherwise, then on-call time is less likely to be compensable. 5 C.F.R. § 551.431(b)(2) (1989); *Brock*, 826 F.2d at 373;

The employee-plaintiffs in the case of *Brock v. El Paso Natural Gas*, 826 F.2d 369 (5th Cir. 1987) worked at 22 satellite pumping stations along an interstate natural gas pipeline system. These stations were located in isolated areas, with the employees' family homes located at the employment site. Each home had an alarm system connected to the satellite station. Each employee worked a regularly scheduled 40-hour week. Company policy was to have one employee "on-call" from 4:00 p.m. to 7:30 a.m. each night to prevent vandalism and theft. If problems arose at the station, the alarm would sound in the home of the "on-call" employee, who would be obligated to investigate and correct the problem.

The Court of Appeals reversed a District Court holding that the employees' on-call time was compensable. One of the reasons was the ease with which employees could trade on-call time. They had absolute flexibility and could divest themselves of on-call responsibilities by trading with another employee or requesting that the company relieve them. *Id.* at 373. The court also noted that alarms were infrequent.

Defendants claim that it is easy for the coroners to trade on-call shifts. According to defendants, the evidence established that coroner investigators are able to have one of the other coroner investigators or the Chief Deputy Coroner cover for them if they choose not to be available during all or part of an on-call shift.

The plaintiffs claim that this ease is purely theoretical. Since there are so few coroners, they have little if any flexibility in trading their on-call time. Although the three deputies could arrange among themselves to "cover" for each other, the evidence was also uncontradicted that such trades were reserved for special occasions, and that it was much more common for the deputies to work their usual schedules and plan their personal activities around them. Because off-duty time was so valuable, the deputies were reluctant to seek trades except in

important circumstances, because of their unwillingness to impose on each other's off-duty time. For example, a deputy might trade call in order to attend a child's school graduation, or for a few hours while teaching a class. (Berry testimony).

There was conflicting testimony regarding plaintiff Berry and how he managed to teach for a number of semesters at a local community college. The hours of the class were typically on two consecutive evenings, when Berry was on-call. If Berry was able to use his on-call time to teach a class, then that tends to show that the coroners could use their on-call time for personal pursuits. If he was able to have another coroner cover for him, then that tends to show that the coroners could trade on-call time. Either way, Berry's teaching a class during his on-call shifts tends to undermine plaintiffs' position.

Although Chief Deputy Coroner Siebe testified that he was available to take on-call duty, the plaintiffs testified that they had seldom if ever requested this.

This court concludes that, in actual practice, the deputies seldom voluntarily traded on-call shifts, but were likely to be drafted to cover for another deputy who was absent due to illness, vacation, training or military service. Some coroners seemed to be more enterprising or more ingenious than others in arranging their schedules around their personal or business pursuits. Practically speaking, with so few coroners, there was little to be gained by trading on-call time.

8) Whether They may Transport Family Members in Their County Vehicles, or Whether Family Members Must Travel in Separate Cars

If the plaintiffs could not have family members in their county vehicles, which they were required to use while on-call, that would tend to limit their ability to socialize with their families.[5] This would make their on-call time more likely to be compensable.

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[5] The County vehicles were minivans, each having two seats (driver and one passenger), the deputy's equipment for on-scene invesigations, and room to transport a body, if necessary.

Plaintiffs claim it was Sheriff's Department policy and actual practice that family members not be transported in the County vehicle. Chief Deputy Coroner Siebe published a memorandum in October, 1988 (Pl.Ex. 35) stating:

> I would like to clarify a question that has come up about the use of County vehicles. The Coroner's vehicles are assigned to Investigators on a temporary basis only. Due to your on-call status, you will retain control of the vehicle on a 24-hour basis. You will follow the rules set forth in the Policy & Procedure Manual, specifically, "*Citizens will not be transported in departmental vehicles unless necessary to accomplish a departmental purpose.*" You will be responsible for the cleanliness and maintenance of the vehicles. *The vehicles will not be used for any personal business.* (Emphasis supplied)

The memorandum was issued in response to an incident in which Marcus was in a fender-bender in a coroner vehicle with his wife as a passenger. (Marcus testimony, Dunham testimony)

Plaintiffs testified that they did not transport family members in their County vehicles and that when they had asked permission to do so, it was denied. (Oravetz testimony).

Defendants said that the actual practice of the Sheriff's Department was to allow family members to be transported in County vehicles. Siebe testified that he permitted deputies to transport family members in their County vehicles, while on-call. This is contrary to written County policy, as stated in Siebe's own memo. The reason that Oravetz was denied permission to allow his wife to accompany him to San Francisco in the County vehicle was that McAllister was *off-duty* at the time. Undersheriff Moore testified that no civilians were permitted in County vehicles unless for a work-related purpose. This court finds that the written policy of the Sheriff's Office was that civilians not be transported in County vehicles, unless it achieved an official purpose.

9) Extent of Personal Activities Engaged in During On-Call Time

On-call time may be compensable work time within the meaning of the FLSA. During the time an employee is on-call, he may be on duty when his responsibility is to be prepared immediately to respond to a call under the conditions established by his employer. The standard for determining the compensability of on-call time has been broadly phrased. Federal regulations summarize Supreme Court ruling as follows:

29 C.F.R. § 785.7 Judicial construction

The United States Supreme Court originally stated that employees subject to the act must be paid for all time spent in physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer or his business. *Tennessee C. I. & R. Co. v. Muscoda*, 321 U.S. 590, [64 S. Ct.698 88 L.Ed. 949] (1944).[6]

Subsequently the Court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his employer, that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a standby capacity. Readiness to serve may be hired, quite as much as service itself, the time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer." *Armour & Co. v. Wantock*, 323 U.S. 126 [65 S. Ct. 165, 89 L. Ed. 118] (1944); *Skidmore v. Swift & Co.*, 323 U.S. 134 [65 S.Ct. 161, 89 L.Ed. 124] (1944).

The most significant test in determining whether an employee's time spent on-call is compensable or not is whether he is engaged to wait or waiting to be engaged. If the employee

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[6] The Ninth Circuit noted that such a case required detailed and specific findings, *Waialua Agr. Co. v. Maneja* 178 F.2d 603, 607 (9th Cir. 1949).

cannot effectively use on-call time for personal pursuits, then the employee is engaged to wait and on-call time is compensable.

Since the FLSA became applicable to public agencies, there has been little appellate court guidance on the compensability of public employees' on-call time. In one case, the Court of Appeals affirmed the lower court's finding that firefighters' on-call time was compensable under the FLSA. The critical factors were the frequency of calls and the required response time. Because of these two factors, firefighters could not use their on-call time for personal pursuits. In one twenty-four hour on-call shift, firefighters received an average of 3-5 calls to return to the firehouse ready to fight a fire within twenty minutes of the call. Firefighters who were late or missed a callback were subject to discipline.[7] Firefighters were paid overtime for on-call time only when actually called back to work. Firefighters who were called back to work were paid a minimum of one hour overtime. The firefighters filed suit for compensation and other relief under the FLSA. In their complaint the firefighters alleged that they were unable effectively to use their on-call time for personal activities; the on-call duty was time spent working in excess of the hourly levels set forth in FLSA and therefore compensable under FLSA; and, furthermore, their employer's actions and omissions showed bad faith. 948 F.2d at 1531.

The lower court found, and the Court of Appeals agreed, that it was difficult if not impossible for firefighters to hold secondary employment or trade on-call time, when they had to respond to 3-5 calls per shift within twenty minutes, or face discipline.

Plaintiffs believe their situation to be comparable to the firefighters' in *Renfro*.

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[7] Firefighters who were late in responding or missed a callback received a "white slip," a form of discipline which was considered in employee evaluations and which may result in disciplinary action, including possible termination, if four or more white slips are received in a four-month period.

Coroner investigators normally worked four ten-hour on-duty shifts. Most often, their on-call shifts immediately followed each on-duty shift. Typically a coroner investigator would work ten hours on-duty, eight hours on-call, then repeat, until the four ten hour on-duty shifts were completed. The coroner investigator would then have three full days totally off, no on-duty time and no on-call time.

Defendants' witnesses testified that coroner investigators had some flexibility in setting their on-call schedule, choosing in some instances to be on-call on weekends, or to increase their on-call hours. Plaintiffs disagreed, claiming that their on-call schedules were assigned to them with no choice on their part (Berry testimony).

Plaintiffs testified that they seldom traded on-call shifts, partly because, with only three coroners on staff at any one time, there was limited flexibility. Trades were usually reserved for special occasions or necessity, as when a coroner was sick or on vacation. Plaintiff Berry apparently traded call to arrange coverage while he taught classes at a community college. Plaintiffs claimed that their on-call time was spent waiting for the unpredictable interruptions which they knew were coming. They had to be prepared to respond quickly, and in person if necessary, to be ready to deal with bereaved relatives, emergency personnel and homicide investigators, where necessary.

The deputy coroners testified uniformly that their personal activities were restricted while on-call. For example, the deputies did not engage in hobbies which would require them to leave the county (e.g. fishing, hunting, camping, visiting friends and relatives, attending events, attending activities connected with their children's out-of-county schools or sporting events).

They did not engage in activities which they did not want to be interrupted (movies, dining out, shopping, labor-intensive tasks, and entertaining at home.)

They did not engage in activities which would make them dirty and possible delay a response (vehicle maintenance, gardening, household chores and maintenance, in-county hunting).

They refrained from activities which rendered them inaccessible by pager (walks on beach at Bodega Bay, activities near Berry home in "hill" area of Sonoma).

-Additionally, they generally refrained from consuming alcohol, in order to maintain a professional demeanor when dealing with the public.

Attempts at social events or travel in Sonoma County was further restricted in that separate vehicles were used so that the spouse or family would not be without transportation if the deputy was called out to a death scene; and to comply with the deputy coroner's understanding that family members could not properly be in the coroner vehicle.

Defendants claimed that the plaintiffs could indulge in many personal pursuits, since they had to investigate a death only an average of once or twice during each eight-hour on-call shift and this investigation was almost always conducted by telephone. Only once in 60-75 hours on-call, say defendants, would the coroner actually have to respond in-person to a death scene. Some earlier statistics showed in-person investigations to be necessary once per seventeen hours on-call or every two eight-hour shifts.

According to defendants, Plaintiffs here are freer [than plaintiffs in other cases] to engage in personal pursuits than all these other employees because of the comparative lack of restrictions. Moreover, given that the vast majority of on-call time is in the late night and early morning hours, plaintiffs cannot be said to be practically precluded from any of the activities that they described, such as travelling to San Francisco, fishing, hiking, etc., since such activities are not ordinarily undertaken between midnight and 7:00 a.m. If, at other times, coroner investigators simply "sit by the phone and wait for it to ring," as claimed, it is not because they are explicitly or effectively required to do so. They are given latitude and discretion to use the time as they please. In fact, deputy coroners have been able to have other employment or businesses while on-call. Plaintiff Berry taught classes at a local community college and answered calls for a volunteer fire department of which he was Battalion

Chief, while on-call. Siebe, when he was a deputy coroner, had a firewood business and a machine shop business. Siebe also testified that he attended his children's sports events while on-call.

However, as in *Renfro*, the fact that one or two employees were able to have secondary employment does not mean that such employment was not difficult or even impossible under the circumstances 948 F.2d at 1535. Berry and Siebe were the only coroners who claimed to have had secondary employment. Dunham, Marcus, McAllister and Oravetz all testified that the coroners could not and did not have secondary employment while on-call.

Coroner investigators could sleep, read, watch television, do some household chores, go out to dinner or a movie, while on-call. They were not required to respond in person to a call within any time limit and most of their on-call responsibilities could be handled by telephone, so there was no "time-limit leash" restricting their movements.

They did not engage in activities which would make it difficult for them to respond promptly to a call. They did not pursue social activities with their families while on call, both because of the restriction on having family members in their County vehicles and because they could be interrupted. They limited their consumption of alcohol to the extent that they wanted to present a sober image if they had contact with the public. For the same reason they refrained from strenuous or dirty activities like yard work or car maintenance while on-call, in order to be presentable to the public in case they would have to report in person to a death scene.

Deputies made and received more telephone calls than they logged and charged to the County, and these interruptions were unpredictable and often disturbed their sleep.

While on-call they remained in a state of readiness to work; they were engaged to wait. *See* 29 C.F.R. Section 553.221(d) (1989).

10) The Existence and Provisions of any Agreement Between the Parties Governing On-Call Work

The parties' agreement to these conditions of employment is one factor to consider in determining whether working conditions comply with the FLSA. *See, e.g.* 826 F.2d at 374; 805 F.2d at 1248; *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507 (9th Cir. 1978).

In the case of *Rousseau*, the employees were required to spend seven full days at a time working and living on a barge. Although the employees could not leave the barge during the seven day stretches, they received compensation only for time spent in the act of labor. 805 F.2d at 1247.

Even though the employees were restricted to the barge, the court denied plaintiffs' claims that they should be compensated for all hours spent on-call, emphasizing that the parties had entered into an agreement otherwise. "The district court found that Teledyne and the employees operated under an agreement that the employees would only receive compensation for hours spent in physical labor . . . *Although the existence of an agreement may not be controlling in all cases, it is usually relevant to the compensability issue." Id.*

The court supported the district court's finding of an agreement between Teledyne and the employees. Representatives of Teledyne testified to informing the employees of the policy at various times. Indeed, many of the employees who testified admitted at least some awareness of the policy.

Of course, it is clear that the employees did not like the no leave rule. But their dislike does not negate the existence of an agreement. As the district court points out, *continuance of employment can be evidence of an implied agreement to the terms of that employment.* [Citation.] *Id.* at 1248 (emphasis added).

Defendants distinguish the case of *Tennessee C.,I. & R. Co. v. Muscoda*, 321 U.S. 590, 88 L. Ed. 949, 64 S. Ct. 698 (1944) and *Jewell Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America*, 325 U.S. 161, 65 S.Ct. 1063 89, L.Ed. 1534, (1945), where employers were ordered to compensate employees for travel time underground, from *Skidmore v. Swift & Co.*,

323 U.S. 134, 65 S. Ct.161, 89 L.Ed. 124, (1944) and *Armour & Co. v. Wantock*, 323 U.S. 126, 65 S. Ct. 165, 89 L.Ed. 118, (1944), where employers were ordered to pay employees for stand-by time.

The Supreme Court, in both *Jewell Ridge* and *Tennessee Coal*, went to great lengths to distinguish the facts—no conclusive agreement and definitive regulations and statutes mandating that underground travel time be compensated—from those present in the two "waiting time" or "on-call" cases, namely *Skidmore v. Swift & Co.*, and *Armour and Co. v. Wantock*.

Defendants claim that the plaintiffs agreed to the terms of their on-call compensation: 5 per cent premium pay and hourly overtime minimums for any work actually performed while on-call. This agreement was reached by the process of collective bargaining between the County and the Sheriff's Department Employees' Association.[8]

Prior to 1982, coroners were paid 5% of their hourly pay for each hour on-call. This was apparently a "bookkeeping nightmare" and thereafter the coroners received a 5% overall increase and hourly minimums for time spent investigating a case. (McAllister and Berry testimony, Def. Ex. A, Court Ex. 2)

It is undisputed that each plaintiff understood the requirements of the job before he applied for and accepted the position. Until filing suit, say defendants, plaintiffs did not complain about the on-call requirements; indeed, the more senior members chose shifts with the most on-call time.

Defendants argue that public policy reasons mandate that the parties' agreement be considered, and indeed should be controlling if reasonable. Here, for over three years, coroner investigators, as well as other employees within the Sheriff's Department, accepted various forms of compensation for their on-call time, pursuant to negotiated collective bargaining agreements. Plaintiffs should not now be permitted to "renegotiate" their agreements, thus throwing the budget process

[8] All of the plaintiffs except McAllister were members.

into a state of chaos. Plaintiffs claim that it is against public policy for parties to contract away their rights under the FLSA and that in fact such agreements are unenforceable. Plaintiffs contend that the Supreme Court has determined that the FLSA invalidates and supersedes any inconsistent provision in a collective bargaining agreement.

For example, the Supreme Court considered the compensability under the FLSA of certain travel time by miners. The employer argued against compensability based on past practice and contract. The Supreme Court rejected the argument:

> But in any event it is immaterial that there may have been a prior custom or contract not to consider certain work within the compass of the work week or not to compensate employees for certain portions of their work. The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him only for a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights. (Citation and footnote omitted) 321 U.S. at 602-03, 64 S.Ct. at 705).

The same principal has been followed by the Ninth Circuit. In *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507 (9th Cir. 1978) the court considered the effect of a collective bargaining agreement on a claim for overtime under the FLSA, and rejected an employer defense that the FLSA claim had been waived by virtue of the provisions of a collective bargaining agreement:

> The only remaining defense by Inflight is that the Union and a substantial number of employees waived the contract provisions pertaining to overtime wages. This contention must be rejected. Assuming that officials of the Union

> and some of its members could waive or modify the written terms of the collective bargaining agreement by their conduct, a proposition upon which we expressly decline to rule, the agreement cannot be altered in a manner which would violate public policy as expressed by the Fair Labor Standards Act. *See Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590 [64 S.Ct. 698, 88 L.Ed. 949] (1944). *Id.* at 513.

Plaintiffs claim that the Coroner's Bureau is a very small group within a very large bargaining unit—all the members of the Sonoma County Sheriff's Employees Association. Furthermore, few of the other employees have on-call responsibilities. The coroners claim that their rights were bargained away in the face of the larger group's interests. They dispute that the 5% premium represents compensation for being on-call and characterize it as "specialist pay," for their expertise as investigators.

No provision of any of the Memorandums of Understanding specifically stated that the 5 percent detective premium given to the deputy coroners was meant to compensate them for on-call activities. Defendants' witnesses testified inconsistently whether the 5% premium was detective pay or compensation for having an on-call obligation. (Siebe testimony). In fact, every single Memorandum of Understanding between the County and the Sheriff's Department Employees' Association from 1980 through 1992 treated premium pay separately from both overtime pay and callback pay.

The evidence was strong that premium pay represented compensation for expertise, not for being on-call. The others receiving premium compensation (sometimes referred to as specialist premium or special assignment premium) included: Special Weapons and Tactics (S.W.A.T.), Bomb Disposal, Field Training Officer, Dog Handler, and Helicopter pilot. These are all categories of Sheriff's Department personnel having special training and abilities. Plaintiffs and their witnesses testified to the special expertise required of a deputy coroner. He is often the first on the scene of a suspicious death. He must preserve

evidence for other investigators, in the case of suspected homicide, child abuse, drug overdose, accident or other death where the evidence may be used in criminal proceedings. He must also be prepared to refer family members for appropriate social services and arrange for securing of property and disposition of the body of the deceased.

Plaintiffs also dispute allegations that the deputies never complained about being required to be on-call. In fact, plaintiffs Berry and Marcus on July 18, 1988 filed an "Employee Hazard Report" complaining about "inadequate personnel in unit to handle extensive workload," and specifically citing excessive on-call time as a hazard. Berry and Marcus sought increased staffing as a remedy for the problem.

This court finds that the parties did have an agreement regarding compensation for work done during on-call shifts. The agreement included a two-hour minimum, later reduced to a one-hour minimum, at one and one-half times the deputy's regular hourly pay, for telephone investigations and a two-hour minimum, at the same rate, if the deputy were actually called to a death scene, regardless of the actual time spent. The court finds that there was no clear agreement as to the 5 percent premium and that there was no written provision of the Memorandum of Understanding specifying that this 5 percent premium was in fact compensation for being on-call. The court finds that the 5 percent premium was not part of the parties' agreement regarding on-call compensation.

The Court rejects defendants' argument that public policy mandates that the existing contractual arrangements between the County and the deputy coroners be accepted as controlling in this matter. The Court further rejects defendants' implication that for the Court to rule otherwise would be tantamount to permitting the plaintiffs to "renegotiate" their agreement, and would throw the budget process into chaos. Simply put, the mandate and legal requirements of the FLSA must be implemented in this matter now. Plaintiffs should not be forever indentured by reason of past budget constraints, nor foreclosed from rightfully claiming their entitled compensation because of

"doomsday" predictions of budgetary chaos. The Court is not the forum to seek a political moratorium or an exception from implementing the mandate of the FLSA. The defendants should look to the proper political forum.[9]

11) Defendants' Wilfulness or Bad Faith in Violating FLSA

If defendants acted wilfully or in bad faith in violating the FLSA, then the applicable statute of limitations is three years, rather than two years, and plaintiffs are entitled to liquidated damages, equal to the amount of compensatory damages. 29 U.S.C. § 255(a), § 216(b).

The test proposed by defendants for determining whether liquidated damages should be awarded, in an instance of non-compliance with the FLSA, is prescribed in 29 U.S.C. § 260, which provides, in pertinent part:

> If the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 of such Act.

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[9] Particularly noteworthy is the testimony of the former Chief Deputy Coroner, Wayne Dunham, and the present Undersheriff, Dale Moore. Dunham testified that for several fiscal years prior to his retirement in 1988, he had submitted budget requests for one additional deputy coroner. This additional deputy would have permitted the Coroner's Bureau to implement a "fireman's shift," a schedule for each deputy of twenty-four hours on-duty and twenty-four hours off-duty. It has been suggested that such an arrangement might have prevented the conditions which led to this lawsuit. Moore testified that in 1988 he recommended to the Sheriff that the budget include provisions for a fourth deputy coroner and that the Board of Supervisors approved this provision. The position was not filled because Dunham retired and Siebe became Chief Deputy Coroner. Siebe changed the policy on response time to deaths in convalescent homes to require a response the next on-duty shift, rather than immediately. This reduced the statistics on number of on-call responses by the deputies.

29 U.S.C. § 260.

Pursuant to § 260, if the employer establishes that the alleged violation of the FLSA was in good faith and that he or she had reasonable grounds for believing that no violation took place, liquidated damages should not be awarded since they are primarily designed to compensate for concealed violations of the FLSA. *See, Equal Employment Opportunity Commission v. First Citizens Bank*, 758 F.2d 397, 403 (9th Cir. 1985), *cert. denied*, 474 U.S. 902, 106 S.Ct. 228, 88 L.Ed.2d 228, (1985).

The employer satisfied the "good faith" component of the test if it proves that it had "an honest intention to ascertain what [the FLSA] requires" and an honest intention to "act in accordance with it." *Brock v. Shirk*, 833 F.2d 1326, 1330 (9th Cir.1987), vacated on other grounds, 488 U.S. 806, 109 S.Ct. 38, 102 L.Ed.2nd 18 (1988); *see, also, Bratt v. County of Los Angeles*, 912 F.2d 1066, 1072 (9th Cir. 1990). Such "honest intentions" are established if it is shown that the employer's decision not to compensate employees for certain overtime is made "above board" and "justified in public" 912 F.2d at 1072. As pointed out in *Bratt*, liquidated damages are generally only awarded where there has been some concealment of the law from employees or an attempt to avoid the law by using "ticky-tack" defenses. *Id.*

In addition to the "good faith" test, pursuant to Section 260, the employer must establish that he has reasonable grounds for believing that his conduct complied with the Act. *Id.* at 1072. Thus, where, as in *Bratt*, there is no clear-cut violation of the applicable regulations, or the regulations themselves are not specific, an interpretation that is found by the court to be incorrect can still be said to be reasonable.

Defendants claimed, through the testimony of Ray Myers and Sally Brian, that the County made a significant effort following the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed. 2d 1016, (1985), to familiarize itself with the FLSA, and to ensure that it was in compliance. In that respect, Ms. Brian

attended many programs and seminars, reviewed all regulations and the FLSA itself and reviewed numerous treatises, Wage and Hour opinion letters and other pertinent materials. Ray Myers, the Employee Relations Manager from 1982 through 1990 testified that the issue first came up in connection with the negotiations for the 1982-84 Memorandum of Understanding. At that time the parties agreed that, rather than receiving 5 per cent of the employee's base hourly rate for each on-call hour, the coroner investigators would receive an overall 5 percent pay increase in exchange. Thereafter, when the subject of compensation for on-call time was raised, Myers would point out to plaintiffs' negotiators that the 5 percent "premium pay" was meant to compensate for the requirement of on-call time.

In October, 1985, Ms. Brian conducted a meeting attended by members of the Coroner's Bureau, to discuss and obtain information regarding the FLSA. The issues of whether or not standby pay is compensable, and the restrictions under which standby pay would be compensable, were specifically discussed at the meeting.

The coroner investigators, by their professional bargaining team, initially took the position that on-call hours were compensable. Ms. Brian researched the matter, at Mr. Myers' request, and Ms. Brian presented the coroner investigators' team with the authorities used as the basis for the County's position. On-call time was not to be compensated.

The issue was raised again during negotiations for the 1988-90 collective bargaining and the parties ultimately, once again, agreed that the on-call time was not compensable. (Brian testimony)

Myers and Brian testified that the County representatives attempted to obtain as much information as they could on the FLSA in general and on-call time in particular. They consulted applicable regulations, educated themselves concerning the proper standards, and then made an honest and good faith determination that the coroner investigators' on-call time was not compensable. The decision was made "above-board" and

was "justified in public" in that it was addressed during repeated collective bargaining negotiations between the Sheriff's Department and the employees' union.

The County also claims it had reasonable grounds for believing that its conduct complied with the FLSA. As pointed out in *Bratt*, where, as here, the applicable regulations provide only general guidelines, it is difficult to say that there was a clear cut violation.

Plaintiffs disagree generally with defendants' version of events and offer the following guidelines: Plaintiffs note that the FLSA establishes a three-year statute of limitations for a cause of action "arising out of a willful violation." Otherwise the statute of limitations is two years. See, 29 U.S.C. § 255(a). In determining whether the violation was willful, the court should consider several factors.

Plaintiffs contend that under the standard set forth in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 108 S.Ct. 1677, 100 L.Ed.2d 115, (1988), actions are willful when they are "voluntary," "deliberate," or "intentional," and not merely negligent. Furthermore, the Department of Labor regulations require the employer to be aggressive and vigilant in assuring that the FLSA is enforced and does not allow an employer to "sit back and accept the benefits without compensating for them." (29 C.F.R. § 785.13).

Plaintiffs offer evidence to show that defendants were content to ignore complaints about working conditions in the Coroner's Office, including the on-call schedule, and "sit back and accept the benefit" of the on-call schedule without compensating for it.

Since fiscal 1984-85, defendants have been repeatedly notified through the budget process that the Coroner's Office was "working at a 2.5 man deficit.", that additional personnel were needed to "ensure adequate coverage of death investigations with reduced on-call time, stress and overtime to meet the needs of the current caseload," and that current conditions sometimes required an individual to be on-call for 96 hours,

and that the Coroner's Office needed at least one additional full-time qualified coroner's investigator to eliminate stress and excess overtime. (Pl.Ex 28: Program Improvement Requests for Fiscal Year 84-85, 85-86, 87-88 and 88-89).

The increase in volume of cases was presented to the Board of Supervisors in 1986, 1987 and 1988 through the Coroner's Annual Report prepared by Dunham. (Pl.Ex. 25, 26, 27 (esp. p. 9, 16).

Defendants were also informed of working conditions in the Coroner's Office through an "Employee Hazard Report" (Pl.Ex 12) which complained of:

> Inadequate personnel in unit to safely handle excessive workload. Staff routinely works 24 hours per day (regular hours plus on-call duty) for four days in a row resulting in insufficient sleep and rest periods away from active duty, danger in use of county vehicles, officer alertness while contacting public.

Despite constant pleas for additional staffing from the Chief Deputy Coroner, defendants did not seek any written administrative ruling or advice from the Department of Labor or Administrator of the Wage and Hour Division as to its obligations regarding compensation for on-call time. Plaintiffs claim defendants' efforts to investigate were minimal, consisting of Brian's attendance at a seminar on the FLSA conducted by a management law firm and consulting a Department of Labor handout relating to nurses. This handout warned that employees who were unable to use on-call time for personal pursuits might be "engaged to wait" and therefore entitled to compensation. Despite this warning, Brian did not discuss the Coroner's on-call policy with Dunham or any deputy coroner, did not familiarize herself with Coroner's Office staffing, did not review any Coroner's Office documents reflecting frequency of calls, did not familiarize herself with deputy coroner duties and did not review the Annual Report.

According to plaintiffs, defendants reached their decision that on-call time was not compensable prior to collective bargaining negotiations and therefore did not bargain in good faith.

Further, plaintiffs believe defendants ceased investigating this issue in 1986, despite several Wage and Hour opinion letters which could, if applied to the deputy coroners' circumstances, have led defendants to believe their on-call time to be compensable. (Pl.Ex. 5, 6 and 7).

Plaintiffs argue that defendants have no defense under 29 U.S.C. § 259, since they did not seek a ruling or written opinion from the Wage and Hour Administration of the Department of Labor on the issue of compensability of on-call time for deputy coroners. If so, then defendants cannot claim under the statute that they were "in good faith in conformity with and in reliance on a written administrative regulation" of the Wage and Hour Administrator.

Defendants did not consult the appropriate regulations, according to plaintiffs, especially the regulations set forth in 29 C.F.R. § 553.221, applicable specifically to public agencies. Nor did defendants seek specific advice from the Department of Labor regarding the situation in the Coroner's Office.

If the County made inadequate efforts to ensure that its employment agreement with the coroner investigators complied with the FLSA, and the agreement and practice of defendants does not in fact comply with the FLSA, then the investigators may be entitled to liquidated damages, equal to the amount of the overtime pay due them. 948 F.2d at 1541.

In the *Renfro* case, the employer's representative made one phone call to the Department of Labor to determine whether their overtime compensation plan complied with the FLSA. They were unable at trial to remember anything except the name of the Department of Labor employee, neither her job title nor specifics of what she said. The court found this to be evidence that the employer did not have "reasonable grounds" for believing its position to be in compliance. *Id.*

Applying the standards for determining the employer's good faith and reasonable grounds for assuming it was in compliance with the FLSA, this court finds that the Sheriff's Department was acting in good faith and was reasonable in assuming that its overtime compensation policy was in compliance with the FLSA. Personnel analysts had attended seminars, reviewed the statute and reviewed the U.S. Supreme Court decision in *Garcia*, as well as Wage and Hour rulings regarding other on-call employees.

The parties had raised and negotiated the issue of overtime pay for on-call hours as part of the collective bargaining process and had reached a resolution several times, albeit an unsatisfactory one for the plaintiffs.

Defendants did compensate the coroners for what defendants interpreted to be time worked while on-call.

Since defendants' violation of the FLSA was not wilful, plaintiffs are not entitled to liquidated damages. Furthermore, the applicable statute of limitations is two years, rather than the three years established for wilful violations. This affects plaintiffs' claim for compensatory damages.

This case was filed December 19, 1989. Plaintiffs may therefore claim damages only from December 19, 1987 to the present.

DAMAGES

Plaintiffs have calculated their damages by multiplying their uncompensated hours of on-call time by their pay rate at the time they worked the hours by one and one-half, since these hours represented overtime.

The statistics are defendants', since defendants kept the records of hours worked (based on the deputy coroners' logs) and hours paid, as well as the records of the plaintiffs' rates of pay. The total amount claimed is $200,731.11.

Defendants' violation of the FLSA was in good faith; the applicable statute of limitations is two years. Plaintiffs' calculations should begin at December 19, 1987, two years before

this case was filed. Any amount claimed for the period prior to December 19, 1987 shall be subtracted from plaintiffs' award. Plaintiffs shall prepare a revised calculation of their damages and submit it to the Court.

Plaintiffs are also entitled to an award of attorney's fees, as provided by 29 U.S.C. § 216(b). Plaintiffs shall prepare a sworn declaration detailing the hours expended in this action and the billing rate of counsel, as well as associated costs of suit.

CONCLUSION

This court enters judgment for plaintiffs in the amount of $200,731.11, less calculated unpaid overtime prior to December 19, 1987. Plaintiffs shall prepare and submit to the court the appropriate re-calculation of plaintiffs' damages. This court also awards attorney's fees and costs as substantiated by plaintiffs. This court declines to award liquidated damages, finding that defendants acted in good faith and with reasonable grounds for believing that they were in compliance with the FLSA.

ON MOTION TO RECONSIDER

The parties' post-trial motions came on for hearing on April 30, 1992. Appearing for moving party was W. David Holsberry, Esq. of Davis, Cowell & Bowe. Appearing for defendants was Patrick Grattan, Esq., of Geary, Shea, O'Donnell & Grattan. Plaintiffs moved to correct the amount of the damage award and for an award of attorney's fees. (The motion to correct the amount of the award was submitted without oral argument, pursuantto Local Rule 220-1). Defendants moved for the court to reconsider its findings and conclusions contained in the Memorandum Opinion of February 28, 1992 and enter judgment for defendants. The moving and opposing papers and arguments of counsel having been fully considered and good cause appearing,

IT IS HEREBY ORDERED that the plaintiffs' motions to correct the amount of the damages award and application for attorney's fees are GRANTED. Defendants' motion for reconsideration and to amend the judgment is DENIED.

CORRECTION OF AMOUNT OF DAMAGES AWARD

In its Memorandum Opinion of February 28, 1992 this court awarded damages for unpaid overtime to plaintiffs in the amount of $200,731.11, less unpaid overtime accrued prior to December 19, 1987. This amount reflected the calculation submitted with the pre-trial statement some months prior to trial. Plaintiff's total claim for unpaid overtime, from December 19, 1986, up to the date of trial, however, is $280,074.03. The court found that the statute of limitations for this claim is two years, since defendants did not show bad faith. Plaintiffs' claims for unpaid overtime prior to December 19, 1987 are $38,407.81. Subtracting the overtime for the year prior to the statute of limitations yields plaintiffs' claim for damages from December 19, 1987 to time of trial: $241,666.22. Plaintiffs substantiated their claims using documents such as work logs and other pay records admitted into evidence at trial. The motion to correct the amount of the damages award is therefore GRANTED.

MOTION TO AMEND JUDGMENT

Defendants requested that the court reconsider certain findings of fact and conclusions of law in its Memorandum Opinion of February 28, 1992. Defendants also requested that the court, on the basis of this reconsideration, render judgment for defendants in this case. The issues which defendants request the court to reconsider are:

1) whether the 5% pay increase received by plaintiffs in 1982 was compensation for on-call time;

2) the number of calls plaintiffs received while on-call requiring an in-person response;

3) number of telephone calls initiating a death investigation plaintiffs received while on-call.

The court considered the moving and opposing papers and the argument of counsel. The court finds that there is no basis for reconsidering its findings and conclusions and therefor the motion to amend the Memorandum Opinion and enter judgment for defendants is DENIED.

[The District Court's discussion of Plaintiffs' application for attorneys' fees is omitted.]

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-89-4476 SAW

GREGORY BERRY, PHILLIP MARCUS,
DENNIS MCALLISTER, FRANCIS ORAVETZ,

PLAINTIFFS

v.

COUNTY OF SONOMA, SONOMA COUNTY SHERIFF'S
DEPARTMENT, SONOMA COUNTY BOARD OF SUPERVISORS,
JANET NICHOLAS, JAMES HARBERSON, TIM SMITH,
NICK ESPOSTI, ERNEST CARPENTER,
RICHARD MICHAELSON,

DEFENDANTS

March 28, 1991

MEMORANDUM AND ORDER

STANLEY A. WEIGEL, District Judge

The question presented in this case is whether the Fair Labor Standards Act of 1938 ("the FLSA"), 29 U.S.C. §§ 201 *et seq.*, requires defendants to pay overtime compensation to plaintiffs for each hour spent "on-call" from December 1986 to the present. This action was brought by Gregory Berry, Philip Marcus, Dennis McAllister, and Francis Oravetz, current and former deputy coroners employed by the Sonoma County Sheriff's Department. Defendants are Sonoma County; Sonoma County Sheriff's Department; Sonoma County Board of Supervisors; Richard Michaelson, Sonoma County Sheriff, and Janet Nicholas, James Harberson, Tim Smith, Nick Esposti, and Ernest Carpenter, members of the Board of Supervisors. The parties have filed cross-motions for summary judgment.

Both sides have submitted a mountain of exhibits, declarations, and deposition excerpts in support of their respective motions, many of which are tangential, collateral, and duplicative. Due to the substantial factual record before the Court, some background is in order here.

I. Background

The United States Supreme Court held in *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), that the FLSA applied to local governmental entities. In general, the FLSA requires that employers pay overtime compensation to employees for hours worked in excess of forty hours per workweek. 29 U.S.C. § 207(a). Because of their peculiar work schedules, however, the FLSA has established a special set of rules for fire protection and law enforcement employees. *See* 29 U.S.C. § 207(k).

Plaintiffs are "law enforcement" employees of the Sonoma County Sheriff's Department.[1] At all times relevant to this

[1] "Law enforcement activities" is defined in 29 C.F.R. § 553.211.

litigation, the Sheriff's Department has employed only three deputy coroners at any one time. Although the Coroner's Office's regular business hours are Monday through Friday, 8 a.m. to 5 p.m., coroners are required by California statute to respond to certain reported deaths twenty-four hours a day, seven days a week. *See* Cal. Gov't Code §§ 27491 *et seq.*; Cal. Health & Safety Code §§ 10250 *et seq.*

Pursuant to 29 U.S.C. § 207(k), the Sonoma County Sheriff's Department has established a fourteen-day work period. In each work period, plaintiffs are regularly scheduled to work eight ten-hour shifts, for a total of eighty hours. In addition, the coroners are required as a condition of their employment to work many extra hours on an "on-call" basis to fulfill the Coroner's Office's statutory obligation to be available at all times. One coroner is always on-call during after-business hours. For example, under the schedule in place since October 1990, approximately 71 hours per week are covered by the coroners on an on-call basis. These 71 hours are divided among the current coroners as follows: Mr. Berry works 30 hours per week on-call, Mr. McAllister works 20, and Mr. Oravetz works 21.[2] Prior to October 1990, approximately 60 hours per week were covered on an on-call basis.

In accordance with the FLSA, the County pays the coroners overtime compensation, at a rate of one and one-half times their regular pay, for all hours worked in excess of eight-six hours per work period. *See* 29 U.S.C. § 207(k); 29 C.F.R. § 553.230(c). Plaintiffs receive overtime pay for all hours actually *worked* during their on-call time, but receive no compensation for hours spent on-call, but not working.

As discussed below, the precise manner in which the coroners are required to conduct their duties while on-call is disputed. It is safe to say that when certain categories of deaths are reported to the Coroner's Office after hours, the Sheriff's

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[2] The fourth plaintiff, Mr. Marcus, left the employ of the Coroner's Office in November 1988.

Department dispatcher contacts the on-call deputy coroner.[3] That coroner must be available by pager, telephone, or the two-way radio in the coroner's county vehicle to respond to any such inquiry or death report. The coroner is often able to answer these inquiries and handle investigations over the telephone. He is guaranteed a minimum of one hour's overtime compensation for on-call time spent on the telephone. Some reports require the coroner to "call back" to the Coroner's Office in Santa Rosa or to the death scene itself. Although the parties dispute the degree of flexibility the coroners have to deal with calls received during on-call hours, at a minimum it can be said that the frequency and unpredictability of these calls circumscribes the coroners' ability to participate in personal activities and often disrupts their sleep.

Plaintiffs contend that because of the excessive restrictions on their freedom to engage in personal pursuits during their on-call hours, these hours count as "hours worked" under the FLSA. Accordingly, they urge the Court to award them backpay for *all* hours worked on-call, liquidated damages, and attorney's fees. Defendants counter that under the circumstances of this case, plaintiffs are entitled to compensation solely for on-call hours actually spent responding to calls.

II. Discussion

A district court may grant summary judgment only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed 2nd 202 (1986) Fed. R. Civ. P. 56(c). Whether there is any genuine dispute as to any material fact in the instant action presents a very close question. After reviewing hundreds of pages of evidence, the Court concludes that summary judgment is not appropriate because the parties dispute several facts regarding the coroners' responsibilities during their on-call tours

[3] Section 27491 of the California Government Code describes those deaths requiring a coroner inquiry. Generally speaking, the coroner must investigate all violent, sudden, unusual, and unattended deaths. *Id.*

of duty and the attendant restrictions placed on their ability to engage in personal activities during these hours.

In interpreting the FLSA, the United States Supreme Court has long held that waiting time, standby time, and on-call time may be compensable under certain circumstances. *See, e.g., Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L. Ed. 124,(1944); *Armour & Co. v. Wantock*, 323 U.S. 126, 65 S.Ct. 165, 89 L.Ed. 118 (1944). The test this Court must apply in ascertaining whether on-call time is compensable under the FLSA is "[w]hether time is spent predominantly for the employer's benefit or for the employee's." *Armour*, 323 U.S. at 133, 65 S.Ct. at 168. This is a question "dependent upon all the circumstances of the case." *Id.* In other words, the facts may show that the employee was "engaged to wait" or "waited to be engaged." *Skidmore*, 323 U.S. at 137,65 S.Ct. at 163. This is a highly fact-driven test.

The regulations promulgated by the Department of Labor have not added much to the Supreme Court's general test. See 29 C.F.R. §§ 785.14-785.17; 29 C.F.R. § 553.221(d). These regulations establish that on-call time is compensable when the resulting conditions placed on the employee's activities are so restrictive that the employee cannot use the time effectively for personal pursuits. § 785.17; 553.221(d). The Court is not bound by these regulations, but consults them for guidance. *Skidmore*, 323 U.S. at 140, 65 S.Ct at 164.[4]

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[4] Defendants rely heavily on 5 C.F.R. § 551.431 as providing useful assistance for determining when on-call time is compensable. Plaintiffs are correct in noting that this particular regulation is inapposite. Section 551.431 governs *federal* employees and is promulgated not by the Department of Labor, but by the Office of Personnel Management, pursuant to the Federal Employees Pay Act, 5 U.S.C. §§ 5501 *et seq*. In any event, the Court declines to consult this particular regulation because it excessively limits the occasions upon which on-call time will be deemed compensable under the Act. It shuns the more general tests developed by the Supreme Court and the regulations promulgated by the Department of Labor regulations in favor of a narrow, *per se* approach. For example, the regulation provides that if an employee carries a beeper, his on-call time is not compensable. *See* 5 C.F.R. § 551.431.

The Supreme Court's holding in *Garcia v. San Antonio Metropolitan Transit Auth.* that the FLSA applies to local governments has spawned a number of cases similar to this one in which firefighters and law enforcement officers have sought pay for on-call time—although this is the first such case to arise in this Circuit. Due to the case-by-case analysis such cases require, these other decisions are of limited use here. Moreover, courts have considered similar fact situations and reached quite different results. *Compare Clay v. City of Winona*, 753 F.Supp. 624 (N.D. Miss. 1990) (24-hour on-call firefighter shifts not compensable despite 5-minute response time and restrictions on personal pursuits) *with Renfro v. City of Emporia*, 729 F.Supp. 747 (D. Kan. 1990) (24-hour on-call firefighter shifts compensable due to 20-minute response time, frequency of call-backs, and restrictions on personal pursuits).

These decisions, coupled with various Opinion Letters of the Wage-Hour Administrator of the Department of Labor, however, are helpful in furnishing the factors critical to the determination of whether restrictions placed on employees during on-call hours are so extensive that such time should be deemed hours worked under the Act. These factors include: (1) geographical restrictions on employees' movements;[5] (2) the required response time;[6] (2) the frequency of calls during on-call hours;[7] (3) use of a pager;[8] (4) the ease with which on-call employees can trade on-call responsibilities;[9] (5) extent of per-

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[5] *See, e.g., Renfro*, 729 F.Supp. at 748-49.

[6] *See, e.g., Renfro*, 729 F.Supp. at 748-49; Dept. of Labor, Wage and Hour Div., Ltr. Rul. No. 1695 (Nov. 15, 1988); Dept. of Labor, Wage and Hour Div., Ltr. Rul. (no number assigned) (Mar. 11, 1987).

[7] *Brock v. El Paso Natural Gas Co.*, 826 F.2d 369, 373 (5th Cir. 1987); *Clay*, 753 F.Supp. at 629; *Renfro*, 729 F.Supp. at 748, 751; Dept. of Labor, Wage and Hour Div., Ltr. Rul. No. 1695 (Nov. 15, 1988); Dept. of Labor, Wage and Hour Div., Ltr.Rul. No. 1693 (Sept. 8, 1988).

[8] *See, e.g., Norton v. Worthen Van Serv., Inc.*, 839 F.2d 653, 655 (10th Cir. 1988); *Allen v. United States*, 1 Cl. Ct. 649, 96 Lab. Cas. (CCH) ¶ 34,324, at 45,184, *aff'd without opinion*, 723F.2d 69 (Fed. Cir. 1983).

[9] *Brock*, 826 F.2d at 373.

sonal activities engaged in during on-call time;[10] and (6) the existence and provisions of any agreement between the parties governing on-call work.[11] This list is illustrative, not exhaustive, and no one factor is necessarily dispositive.

It is important to note that there is a collective bargaining agreement between the parties disallowing payment for hours spent on-call, except when the coroners are responding to calls. Furthermore, plaintiffs knew when they accepted their positions that on-call duty was a condition of their employment. Defendants rely heavily upon these facts, claiming that the agreement bars plaintiffs' recovery. Defendants are only partially correct. The Supreme Court has held that the existence of a working agreement between the parties is one factor to consider in assessing whether on-call time redounds to the benefit of the employer or employee. *Skidmore v. Swift & Co.*, 323 U.S. 134, 137, 65 S.Ct. 161, 163, 89 L.Ed. 124, (1944); *see also Brock*, 826 F.2d at 374; *Rousseau*, 805 F.2d at 1248; *Allen*, 724 F.2d at 1135-36; *Renfro*, 729 F.Supp. at 749. Yet the existence of such an agreement is only *one* factor of several to consider. The language used by the Supreme Court in *Skidmore* is instructive on this point. The Court instructed that whether waiting time is compensable under the FLSA

> involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and *all the surrounding circumstances.*

Skidmore, 323 U.S. at 137, 65 S.Ct. at 163 (emphasis added).

While the existence and terms of such an agreement are factors for the Court's consideration, they are not controlling.

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[10] *See, e.g., Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245, 1248 (5th Cir. 1986), *cert. denied*, 484 U.S. 827, 108 S. Ct. 95, 98 L.Ed.2d 56 (1987); *Clay*, 753 F.Supp. at 629; *Renfro*, 729 F.Supp. at 751-52

[11] *See, e.g., Brock*, 826 F.2d at 374; *Rousseau*, 805 F.2d at 1248; *Allen v. Atlantic Richfield Co.*, 724 F.2d 1131, 1135-36 (5thCir. 1984); *Renfro*, 729 F.Supp. at 749.

It is well-settled that any custom or contract inconsistent with the FLSA is unenforceable. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740, 101 S.Ct. 1437, 67 L.Ed.2d 641, (1981); *Jewell Ridge Coal Corp. v. Local 6167, United Mine Workers*, 325 U.S. 161, 166-68, 65 S.Ct. 1063, 1066-67, 89 L.Ed. 1534, (1945); *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local 123*, 321 U.S. 590, 602-03, 64 S.Ct. 698, 705, 88 L.Ed. 949, (1944). To hold otherwise would "nullify the purposes" of the Act. *Barrentine*, 450 U.S. at 740, 101 S.Ct at 1445.[12]

It is undisputed that plaintiffs' ability to engage in personal activities while on-call was and is circumscribed to some extent. It is also undisputed that plaintiffs carry a pager. Plaintiffs stress that a substantial amount of the work of the Coroner's Office is performed during on-call time. For instance, between the years 1985 and 1990, approximately 28-35 percent of all coroner reports have been received during on-call hours. The importance of on-call work to the Coroner's Office, however, is not the test for whether on-call hours are compensable. Rather, the test is employee-focused— namely, whether employees are so restricted during their on-call hours that they are effectively "engaged to wait" by their employer.

Although the parties have inundated the Court with every fact that could possibly bear on this litigation, the Court cannot ascertain the restrictiveness of Sonoma County's on-call policy at summary judgment because several material facts remain in dispute. With respect to defendants' liability the parties contest: (1) to what extent the coroners can and do engage in personal pursuits during on-call hours; (2) the amount of time coroners have to respond to calls; (3) the ease with which they

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[12] There is a seeming inconsistency between the Supreme Court's holding that the agreement between the parties is a factor to consider and its holding that agreements in violation of the FLSA are unenforceable. This apparent inconsistency may be resolved by resort to language in Supreme Court opinions suggesting that courts may consider the presence and terms of a working agreement when "difficult and doubtful questions as to whether certain activity or nonactivity constitutes work" are involved. *Jewell*, 325 U.S. at 169-70; *see also Tennessee*, 321 U.S. at 603, 64 S.Ct. at 705, 65 S.Ct. at 1067-68.

can trade on-time responsibilities; (4) whether they may transport family members in their county vehicles, or whether family members must travel in separate cars; (5) whether they must remain within Sonoma County; (6) the number and frequency of miscellaneous work-related calls they receive which are not reflected in the Coroner's Office's statistics; (7) whether plaintiffs' on-call duties are similar to and as demanding as their regular duties; (8) the frequency with which they are "called back" to a death site or to the Coroner's Office.[13]

All the disputed facts relate to the flexibility with which the coroners can contend with their on-call responsibilities. The degree of flexibility they possess in turn determines their ability to engage effectively in personal pursuits while on-call. While any one of these contested facts might not, standing alone, be material in resolving the cross-motions for summary judgment, the facts must be considered together to enable the Court to determine whether under "all the circumstances" plaintiffs' on-call time redounded more to their benefit or to the benefit of their employer. Since what is before the Court is insufficient to resolve this central question, the case must proceed to trial.

Finally, the parties dispute issues relating to damages. Assuming that the FLSA requires defendants to pay plaintiffs backpay for all on-call time, the parties dispute whether defendants "willfully" violated the Act and whether their purported violation was committed in bad faith. The statute of limitations

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[13] The parties appear to agree on the frequency with which plaintiffs have engaged in investigations during on-call hours (ranging from an average of one in every 3.82 hours in 1988 to one in every 8.33 hours in 1989). Defendants introduce evidence to the effect that the frequency of *call-backs* (the occasions on which plaintiffs must report to a death scene or the Coroner's Office) is only one in every 17-21 on-call hours. *See* Siebe Decl., para. 14. Plaintiffs object to this evidence on the ground that Mr. Siebe alludes to statistics on the subject, yet does not provide them. Moreover, plaintiffs specifically requested discovery from defendants regarding call-back statistics, but defendants refused to comply. Plaintiffs' objection to the evidence on call-backs is well-taken. The Court views the frequency of call-backs as unresolved.

for "willful" violations of the Act is three years, but only two years for non-willful violations. 29 U.S.C. § 255(a). In addition to backpay, employers in violation of the FLSA must pay liquidated damages in an amount equal to the unpaid overtime compensation, 29 U.S.C. § 216(b), unless their violation of the Act was in "good faith." 29 U.S.C. §§ 259-260. The evidence submitted by both parties demonstrates that there is a genuine dispute of fact regarding defendants' willfulness and good faith in allegedly violating the FLSA. As with defendants' liability, the Court cannot resolve this issue at this stage of the proceedings.

Accordingly,

IT IS HEREBY ORDERED that both plaintiffs' and defendants' motions for summary judgment are DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 92-16772, 92-16816

GREGORY BERRY; FORREST FASIG; PHILLIP MARCUS; DENNIS MCALLISTER; FRANCIS ORAVETZ; and N. TOM SIEBE,

PLAINTIFFS-APPELLEES, CROSS-APPELLANTS

v.

COUNTY OF SONOMA; SONOMA COUNTY SHERIFF'S DEPARTMENT; SONOMA COUNTY BOARD OF SUPERVISORS; JANET NICHOLAS; JAMES HARBERSON; TIM SMITH; NICK ESPOSITO; ERNEST CARPENTER; and RICHARD MICHAELSON,

DEFENDANTS-APPELLANTS, CROSS-APPELLEES

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Filed September 14, 1994

Before: John T. Noonan, Jr., Thomas G. Nelson, Circuit Judges, and David A. Ezra, U.S. District Judge for the District of Hawaii, sitting by designation

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ORDER

The panel has voted to deny Appellees' petition for rehearing. Judge Noonan and Judge Nelson vote to reject the suggestion for rehearing en banc, and Judge Ezra so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

No. 94-1044

Supreme Court, U.S.
JAN 9 1995
OFFICE OF THE CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1994

GREGORY BERRY, PHILLIP MARCUS,
DENNIS MCALLISTER and FRANCES ORAVETZ,
Petitioners,

VS.

COUNTY OF SONOMA,
SONOMA COUNTY SHERIFF'S DEPARTMENT,
SONOMA COUNTY BOARD OF SUPERVISORS,
JANET NICHOLAS, JAMES HARBERSON, TIM SMITH,
NICK ESPOSITO, ERNEST CARPENTER,
and RICHARD MICHAELSON,
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeal
For The Ninth Circuit

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QUESTIONS PRESENTED

1. Did the Ninth Circuit correctly hold that Petitioners were not entitled to overtime compensation under the Fair Labor Standards Act for time spent on-call, but not actually working, because they could effectively use such time for a wide variety of personal pursuits, including sleeping, reading, watching TV, doing some household chores, going out to dinner, and engaging in other employment?

2. Can a fact-finder attempting to determine whether on-call time is compensable under the Fair Labor Standards Act consider whether the plaintiffs seeking compensation and their authorized collective bargaining representatives treated the time so spent as work?

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Respondents County of Sonoma, et al., respectfully request the Court to deny the petition for certiorari seeking review of the Ninth Circuit's decision in this case.

INTRODUCTION

The Ninth Circuit in this case held that Petitioners, four coroners employed by the County of Sonoma, were not entitled to overtime compensation under the Fair Labor Standards Act (FLSA) for time spent on-call but not actually working. It based this ruling in large part on the District Court's finding that Petitioners have engaged in a wide variety of personal pursuits while on-call, including using on-call time to engage in secondary employment. The Court of Appeals also held—again, based on the findings of the District Court—that Petitioners and their employee association had acquiesced for many years in the County's overtime policy, thus indicating through their conduct that they did not consider on-call time to be compensable work.

The Court of Appeals did not reweigh the evidence heard by the District Court. Instead, it held that the District Court's own findings did not meet the test for on-call compensability set forth in *Owens v. Local No. 169, Ass'n of Western Pulp & Paper Workers*, 971 F.2d 347 (9th Cir. 1992). The Ninth Circuit therefore held that *Owens* compelled entry of judgment in the County's favor.

Petitioners do not contend that *Owens* conflicts with the decisions of other Circuits, doubtless because there is no such conflict. They do not even contend that *Owens* is wrong, thus tacitly recognizing that *Owens* conforms to the cases and regulations interpreting the FLSA. Indeed, the petition does not even mention *Owens* at all, even though that decision sets forth the legal framework used by the Court of Appeals in deciding this case.

Instead, Petitioners attempt to manufacture conflicts between the decision below, on the one hand, and Rule 52(a) and the decisions of this Court, on the other. But none of their arguments justifies granting the writ. This

Court set forth the rules governing the application of Rule 52(a) to FLSA cases in *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986), which holds that whether a given set of facts constitutes an FLSA violation is an issue of law. Accordingly, there is no need for this Court to revisit that issue in this case. Moreover, in holding that the facts found by the District Court were insufficient to require compensation under *Owens*, the decision below simply applied *Icicle Seafoods*'s holding that whether a particular set of facts triggers the FLSA's requirements is a legal issue, not a factual one.

Because *Icicle Seafoods* sets forth the relevant legal principles, there is no conflict in the Circuits as to whether on-call compensability is an issue of fact or law. The cases cited by Petitioners do nothing more than apply well-settled procedural rules (governing summary judgment and the like) to FLSA cases. And Petitioners' argument that on-call compensability *should* be treated as an issue of fact, rather than law, would lead to unpredictability and balkanization of federal law in an area where the Court has stressed the importance of uniform national standards.

Petitioners' waiver argument similarly rests on a misreading of the decision below. They say that this case raises the issue of whether Petitioners' FLSA rights were waived in a collective bargaining agreement. But the decision below does not even mention waiver, much less hold that a waiver had occurred. Instead, the Ninth Circuit simply held that agreements between the parties are relevant—but *not* dispositive—in close FLSA cases involving on-call time, because such agreements indicate whether the parties treated on-call time as work. This ruling, too, fully accords with this Court's cases and the applicable FLSA regulations, and thus presents no issue worthy of review.

STATEMENT OF THE CASE

The first portion of the Petition's Statement of the Case (Pet. 4-5) omits several key facts regarding the duties of coroners and their ability to engage in numerous personal

activities while on-call. It also fails to describe the coroners' acceptance of the County's overtime policy. A more balanced statement of the facts appears in the Ninth Circuit's opinion. *See* Pet. App. at 2a-5a.

As the Ninth Circuit's decision indicates, the County's on-call policy does not prevent Petitioners from using their on-call time to engage in a wide variety of personal activities. *Id.* at 4a. Indeed, the District Court specifically found that Petitioners "could sleep, read, watch television, do some household chores, go out to dinner or a movie, while on-call." *Id.* at 51a. The District Court also found that:

> "[D]eputy coroners have been able to have other employment or businesses while on-call. [Petitioner] Berry taught classes at a local community college and answered calls for a volunteer fire department of which he was Battalion Chief, while on-call. Siebe, when he was a deputy coroner, had a firewood business and a machine shop business." (*Id.* at 50a-51a)

The coroners had the freedom to engage in these activities while on-call because they were subject to only modest geographical and time-related restrictions. To begin with, Petitioners did not have to conduct on-call investigations from the Coroner's Office. *Id.* at 31a ("on-call investigations were usually handled from outside the Coroner's Office, most often the coroner's home"). Instead, while on-call Petitioners could go anywhere within Sonoma County (which has an area of 1,600 square miles), as long as they were within fifteen minutes of a telephone or a two-way radio (which the County provided). *Id.* at 42a-43a.

This geographical flexibility was possible because "there was no explicit response time required for a coroner to report to the scene of a death, and there was no specific response time to initiate a telephone investigation of a

coroner's case . . . ." *Id.* at 34a.[1] Indeed, "most of [Petitioners'] on-call responsibilities could be handled by telephone . . . ." *Id.* at 51a. The District Court therefore concluded that "there was no 'time limit leash' restricting [Petitioners'] movements" while on-call. *Id.*

With respect to the existence and provisions of agreements between the parties, the District Court focused almost exclusively on the County's decision in 1982 to give the investigators a 5% premium in their base salary while it simultaneously eliminated the pre-existing practice of paying the coroners 5% of their hourly rate for each hour of on-call standby time. *Id.* at 55a-56a. The court found that the "evidence was strong that [the 5%] premium pay represented compensation for expertise, not for being on-call." *Id.* at 55a. However, the District Court also acknowledged that the issue of on-call compensation had been repeatedly discussed during collective bargaining negotiations between the parties (*id.* at 59a) and that these negotiations resulted in "a resolution several times" to deny on-call compensation (*id.* at 63a). The District Court also found that "each [Petitioner] understood the requirements of the job before he applied for and accepted the position." *Id.* at 53a.

Despite these findings—which Petitioners largely ignore—the District Court granted judgment for the County. On appeal, the Ninth Circuit reversed, relying on *Owens v. Local No. 169, Ass'n of Western Pulp & Paper Workers*, 971 F.2d 347 (9th Cir. 1992). In *Owens*, which was decided after the District Court issued its decision in this case, the Ninth Circuit identified "two predominant factors in determining whether an employee's on-call waiting time is compensable

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[1]A "coroner's case" is a death report that requires either telephonic or on-the-scene investigation by a coroner. RT 43:15-45:13. In contrast, a "no-case" involves a hospital or physician-attended death in which all the coroner has to do is take basic information over the telephone, assign a case number, fill out a form, and close the case. RT 51:5-54:25. More than two-thirds of all death reports involve "no-cases." *See* Ex. 33.

overtime . . . '(1) the degree to which the employee is free to engage in personal activities; and (2) the agreements between the parties.'" Pet. App. 6a (quoting 971 F.2d at 350). With respect to the first factor, moreover, *Owens* sets forth an "illustrative, non-exhaustive" list of seven issues "to be analyzed in determining the degree to which an employee is free to engage in personal activities while on-call." Pet. App. 12a (citing 971 F.2d at 351).[2] Yet the Petition does not even cite *Owens*, notwithstanding the Ninth Circuit's holding that "*Owens* controls our decision in this case." Pet. App. 6a.

In so holding, the Ninth Circuit did not reweigh the evidence heard by the District Court. Instead, it took the factual findings made by the District Court and evaluated them according to the legal framework set forth in *Owens*. In each instance, the Court of Appeals held that the District Court had reached the wrong result because it evaluated the facts under the wrong legal standard and that, under the correct legal standard, the factual findings made by the District Court required judgment for the County.

First, and most importantly, the Court of Appeals held that the District Court had applied the wrong legal standard to the evidence bearing on Petitioners' ability to use on-call time for their own purposes. As the Ninth Circuit recognized, the District Court had found that Petitioners' on-call time was compensable "because they cannot pursue certain

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[2]The seven factors listed in *Owens* are as follows:

> "(1) whether there was an on-premises living requirement; (2) whether there were excessive geographical restrictions on employee's movements; (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for response was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities (6) whether use of a pager could ease restrictions; and (7) whether the employee had actually engaged in personal activities during call-in time." (971 F.2d at 351 (footnotes omitted))

personal activities." Pet. App. 16a. It then quoted a lengthy passage from the trial court's opinion, where the lower court had listed all the activities Petitioners testified could not be done on call. Pet. App. 16a-17a (quoting Pet. App. 51a). The Court of Appeals then held that the District Court had reached the wrong result because it had asked the wrong question:

> "The inquiry, however, is not whether the coroners are prevented from participating in certain personal activities, but whether they actually engage in personal activities during on call shifts. . . . [A]n employee need not have 'the same flexibility or freedom as he would if not on call' to engage in personal activities in order to conclude that he can use on-call time effectively for his own purposes. Although the coroners are unable to engage in certain pursuits, it is undisputed that while on-call coroners have actually been able to socialize with friends and family, dine out, shop, read, watch television and enjoy hobbies such as gardening, working on antique cars, leather crafts and photography. Also, two coroners actually held secondary employment." (Pet App. 17a (citations omitted))

As this quotation reveals, in reversing the District Court the Ninth Circuit simply applied a different legal gloss to the District Court's findings. The lower court had found that the coroners "could sleep, read, watch television, do some household chores, go out to dinner or a movie, while on-call." Pet. App. 51a. In addition, the court also found that two coroners (Berry and Siebe) had secondary employment while on-call (Pet. App. 51a), and stated specifically that Berry's ability to teach while on-call "tends to undermine [Petitioners'] position." Pet. App. 45a. Yet the lower court found on-call time compensable because it mistakenly focussed on what Petitioners could *not* do, as opposed to what they could. The Court of Appeals simply corrected this legal error.

The same is true with respect to the coroners' response time. Pet. 8. Here, too, the Court of Appeals accepted all the factual findings that the District Court made concerning the time within which Petitioners are required to respond to death reports. Pet. App. 14a. It therefore acknowledged the District Court's findings that: (1) "there was no explicit response time required for a coroner to report to the scene of a death" (Pet. App. 14a, 34a); (2) "there was no specific response time to initiate a telephone investigation of a coroner's case" (Pet. App. 14a, 34a); and (3) that the coroners' actual practice is to initiate investigations "as soon as possible." Pet. App. 14a, 34a. Consequently, the Ninth Circuit did not reweigh the evidence before the District Court; instead, it simply compared the District Court's findings on this issue to the comparable findings set forth in other cases, and concluded that the restrictions imposed on Petitioners in this case were less onerous than those imposed in numerous cases in which compensation had been denied. Pet. App. 14a-15a.[3]

The Ninth Circuit similarly applied its own legal analysis to the District Court's findings regarding the use of pagers. The lower court had found that while "[u]se of an electronic pager may lessen restrictions on an on-call employee by making it possible for the employee to be away from a telephone or two-way radio" (Pet. App. 40a), the pagers available to the Petitioners "were not 100% reliable and so their benefit, if any, to [Petitioners] was only

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[3]As the Ninth Circuit stated, on-call compensation has been denied in several cases where the employees were required to report to the employer's premises within approximately twenty minutes. Pet. App. 14a-15a (citing *Armitage v. City of Emporia*, 982 F.2d 430, 432-33 (10th Cir. 1992); *Bright v. Houston Northwest Medical Ctr. Survivor, Inc.*, 934 F.2d 671, 676 (5th Cir. 1991), *cert. denied*, –U.S.–, 116 L. Ed. 2d 786 (1992); *Norton v. Worthen Van Serv., Inc.*, 839 F.2d 653, 654 (10th Cir. 1988)). In contrast, "[i]n this case, the only required response time is fifteen minutes to answer a page or telephone call, not in person or at the employer's premises, but by telephone or two-way radio. This required response is substantially different than being required to return to the employer's premises within twenty minutes." Pet. App. 15a.

partial." Pet. App. 41a. However, the Court of Appeals held that "the proper inquiry is 'whether use of a pager [can] ease restrictions,' not whether the pager is 100% reliable." Pet. App. 15a (citation omitted). Since the coroners could voluntarily use a pager in those areas of the county where they *were* reliable, the pagers enabled "them to more easily pursue personal activities." Pet. App. 15a.[4]

The Ninth Circuit also found that the District Court had used the wrong legal standard in analyzing the evidence relating to trading shifts. As with the pagers, the Ninth Circuit acknowledged the District Court's findings that: (1) "in actual practice, the [coroners] seldom voluntarily traded on-call shifts" (Pet. 15a, 45a); (2) "the primary reason for seldom trading was the coroners' 'unwillingness to impose on each other's off-duty time'" (Pet. App. 15a, 45a); and (3) "with so few coroners, there was little to be gained by trading on-call time" (Pet. App. 15a, 45a). But the Ninth Circuit found that the District Court had failed to analyze this evidence properly:

> "The proper inquiry is 'whether the on-call employee [can] *easily* trade on-call responsibilities.' There is no evidence that the coroners are unable to trade shifts or have had difficulty at any time trading shifts. . . . The fact that coroners seldom are willing to impose upon one another's off-duty time does not mean they cannot easily trade shifts

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[4]Petitioners charge that the Ninth Circuit "did not address the District Court's finding that three of the four plaintiffs were unable to use pagers because of their geographic location and the pagers' unreliability." Pet. 8. The "cf." cite that follows this sentence is a tacit acknowledgement that the District Court made no such finding. Instead, the court found only that the pagers "were not reliable in all areas of the County, including the areas near *two* of the [Petitioners'] homes." Pet. App. 43a (emphasis added). The pages cited in the Petition (Pet. App. 40a-41a) merely summarize the testimony on this issue presented by plaintiffs and the contrary evidence that the County presented showing that the pagers were not as unreliable as Petitioners contended.

if they seek to trade." (Pet. App. 15a-16a (citation omitted))

Here, again, the Court of Appeals did not reweigh the evidence found by the District Court, but simply relied on the lower court's findings that coroners traded shifts "on special occasions," such as "to attend a child's school graduation or . . . while teaching a class." Pet. App. 44a, 45a.[5]

Finally, the Ninth Circuit held that "the agreements between the parties" supported reversal of the District Court's decision. Pet. App. 7a-11a. Contrary to Petitioners' summary, however, the Court of Appeals did not focus exclusively on the collective bargaining agreement between the County and Petitioners' bargaining representative. Instead, it identified "three different types of agreements between the employer and employees which may be relevant to the issue of on-call compensation." Pet. App. 7a. These include applicable collective bargaining agreements, a constructive agreement if employees are informed of the overtime compensation policy, and an express agreement if the employees voluntarily accept the

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[5]Petitioners assert that the Ninth Circuit made a finding that "[t]he frequency of calls [received by the coroners] was one per 6.45 hours on call." Pet. 7. They then say that this purported finding unjustifiably ignored the District Court's finding that the statistics kept by the parties "understated the actual frequency of calls." *Id.* at 8. But the Ninth Circuit did not make the finding Petitioners attack. Instead, the Court of Appeals found only that the coroners "receive a *death report* . . . once every 6.45 hours." Pet. App. 18a (emphasis added). Thus, this finding concerns death reports, while the District Court's finding concerned the total number of calls received by the coroners. Consequently, there is no contradiction between the two findings.

The District Court did make its own finding on the frequency of death reports, which it found to average one every four hours. Pet. App. 37a ("average frequency of calls *requiring a coroner to respond by telephone* while on-call was one per 4 hours on-call") (emphasis added). The Ninth Circuit found this finding "implausible," because it contradicted statistics agreed to by the parties. Pet. App. 18a n.8. This garden variety application of Rule 52(a) raises no issue worthy of review by the Court.

employer's overtime policy by beginning work after the policy has been implemented. Pet. App. 7a-8a.

Before focussing on the existence and effect of these agreements, however, the Ninth Circuit carefully defined their relevance. First, it emphatically rejected the County's position that such agreements were dispositive. Pet. App. 7a n.5. Second, it held that such agreements were relevant "in determining whether the parties characterized the time spent waiting on-call as actual work." Pet. App. 8a. Third, it limited the scope of this holding by emphasizing that agreements are only relevant if there is otherwise serious doubt as to whether on-call time was work. As the court explained:

> "Our emphasis of the parties' agreements as a predominant factor is not intended to suggest that agreements are controlling regardless of the character of the uncompensated time at issue. The Supreme Court stated in *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944), that the FLSA was not designed to perpetuate contracts pursuant to which employers fail to compensate employees for work. The Court in that case noted that there was no uncertainty that the uncompensated time at issue . . . was actually work. However, it specifically noted that it was not addressing a situation where there were 'serious doubts as to whether certain activity or non-activity constituted work or employment.' In such a situation, the parties' agreements are persuasive evidence of whether they intended to define the activity or non-activity as work. Unlike the uncompensated time at issue in *Muscoda*, there is uncertainty whether on-call waiting time is actual work, and consequently, inquiry into the parties' characterization of on-call waiting time is necessary." (Pet. App. 8a (citations omitted))

After conducting that inquiry, the Ninth Circuit found that "Sonoma County's overtime compensation policy was

pursuant to agreements between the parties." Pet. App. 9a. First, the Memorandum of Understanding (MOU) between the County and Petitioners' bargaining representative "does not provide compensation for on-call waiting time." *Id.* Second, "three of the [Petitioners] expressly agreed to [the] County's overtime compensation policy by accepting employment after the policy had been implemented in 1982." *Id.* Third, the remaining coroner constructively agreed to the policy by continuing to work for nine years after the overtime policy was implemented. *Id.* Finally, the court rejected Petitioners' claim that they had protested the County's policy rather than acquiescing in it, because the purported protest occurred only once, involved only two of the four Petitioners, and was directed at the amount of overtime rather than the lack of on-call compensation. *Id.* at 11a.

The Ninth Circuit thus found that both of the predominant factors identified in *Owens*—the employees' ability to use time for their own personal pursuits and the agreements between the parties—"weigh in favor of reversing the district court." Pet. App. 20a. It therefore held that "the time that coroners spend waiting on-call for actual work is not compensable under the FLSA." *Id.*

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW DOES NOT EXPAND THE PERMISSIBLE SCOPE OF APPELLATE REVIEW IN FLSA CASES.

Petitioners' claim that the decision below "weakens the division of authority between trial courts and appellate courts" (Pet. 10) rests on three distinct bases. First, Petitioners contend that the Courts of Appeals have issued conflicting decisions as to whether on-call compensability is a question of law or of fact. Second, Petitioners assert that, as a matter of federal judicial policy, determinations of compensability should be treated as factual questions

resolved by the District Courts. Third, Petitioners contend that the decision below violates Rule 52(a). None of these arguments justifies granting the writ.

A. There Is No Inter-Circuit Conflict Regarding The Permissible Scope Of Review In On-call Cases.

Fact-finding in FLSA cases is governed by the same principles which govern fact-finding "in other civil bench-tried litigation in federal courts." *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 713 (1986). If there is no triable issue of material fact, summary judgment is appropriate. FED. R. CIV. P. 56. If a reasonable jury or trial court could only reach one result, judgment should be entered as a matter of law under Rule 50. And unless the district court's factual findings are clearly erroneous, they may not be set aside. FED. R. CIV. P. 52(a).

The cases which Petitioners claim pose a conflict with the decision below do nothing more than apply these well-settled principles of law. None of these cases holds that on-call compensability must *always* be decided by a trier of fact, no matter how thin the evidence on one side, just as none of them holds that compensability may *never* be determined by an appropriate fact-finder. Instead, these cases have simply applied the usual rules governing resolution of factual issues by the federal courts to the differing circumstances of each case.

For example, Petitioners assert that *Henson v. Pulaski County Sheriff Department*, 6 F.3d 531 (8th Cir. 1993), stands for the proposition that "the compensability of on-call duty is a fact question that cannot be resolved as a matter of law." Pet. 10. But *Henson* neither states nor applies any such ironclad rule. Indeed, in one of the two appeals consolidated in *Henson*, the Eighth Circuit *affirmed* the trial court's grant of summary judgment, holding that the employer was entitled to judgment "as a matter of law" because the restrictions imposed on the employees "could not support a finding that [they] spend their meal breaks predominantly for the benefit of their employer." 6 F.3d at

536. In contrast, summary judgment was reversed in the other appeal consolidated in *Henson*, where the court could not say as a matter of law whether the employees used their meal times predominantly for their benefit. *Id.* at 537. *Henson* thus stands for nothing more than the wholly unremarkable proposition that factual issues may be decided summarily where a reasonable fact-finder could reach only one result, while such adjudication is inappropriate if the evidence is in conflict.

The remaining cases cited by Petitioners are simply variations on this familiar theme. *Cross v. Arkansas Forestry Commission*, 938 F.2d 912, 916-17 (8th Cir. 1991), holds only that an employer is not entitled to summary judgment where a reasonable jury could find that the employer's policy "sufficiently restricted [the employees] from using their time for personal pursuits." *Id.* at 917. Conversely, *Bright v. Houston Northwest Medical Center Survivor, Inc.*, 934 F.2d 671 (5th Cir. 1991), *cert. denied*, --U.S.--, 116 L. Ed. 2d 786 (1992) merely holds that summary judgment *is* appropriate where "the undisputed facts show that the on-call time is not working time." *Id.* at 675. And *Birdwell v. City of Gadsden*, 970 F.2d 802 (11th Cir. 1992), holds only that JNOV may be granted where, accepting all the plaintiffs' facts as true, their on-call time "was not used predominately for the employer's benefit." *Id.* at 808.

These cases do not conflict with the decision below. This case does not involve summary judgment, JNOV, a non-suit, or any of the other devices trial courts use to decide undisputed factual issues. Conversely, none of the cases cited by Petitioners involves Rule 52(a). Consequently, none of them supports review of the Rule 52(a) issue this case purportedly presents.[6]

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[6]In Part I(C), below, we address Petitioners' claim that the decision below violates Rule 52(a), and show that this contention is neither certworthy nor correct.

Nor do these cases contradict the decisions of this Court. In *Birdwell*, the Eleventh Circuit described the respective roles of judge and jury in an FLSA case by saying: "It is for the court to determine if a set of facts gives rise to liability; it is for the jury to determine if those facts exist." *Id.* at 808. That division of labor is premised on the same distinction between the historical facts and the legal consequences of those facts which this Court articulated in *Icicle Seafoods*:

> "The question of how the respondents spent their working time on board the Arctic Star is a question of fact. The question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law . . . ." (475 U.S. at 714)

Nor do the cases cited by Petitioners conflict with this Court's statement in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), that whether on-call time "falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court." *Id.* at 136-37. As the Fifth Circuit stated in *Bright*, this simply means what no one denies—that FLSA cases are fact-dependent:

> "Taken in context, we believe this language is properly understood as describing the dependency of the coverage question on the particular facts as found in each discrete case, a view that is reinforced to the citation of *Jacksonville Paper Co.*, where the Court approves a remand for new factual findings, observing that '[i]f a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established by the test we have described, he is covered by the Act. Here as in other situations [citation omitted] the question of the Act's coverage depends on the special facts pertaining to the particular business.'" (934 F.2d at 674-75 n.5 (citation omitted))

Accordingly, as the Fifth Circuit held, neither *Skidmore* nor the companion decision in *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), precludes granting summary judgment or a non-suit in an appropriate case:

> "[T]o state . . . that the particular facts in each case are determinative, is not to say that where those discrete facts are found the resulting categorization as working or nonworking time is also necessarily always a factual rather than a legal question. Indeed, *Skidmore* expressly recognizes that '[f]acts may show that the employee was engaged to wait, or they may show that he waited to be engaged.' Obviously, the Court does not mean that the *same* set of facts may lead to different results, but rather that the different facts of discrete cases may produce different results." (*Bright*, 934 F.2d at 674-75 (citation and footnote omitted))

No case cited by Petitioners disagrees with this analysis, or contends that the principle which differentiates between factual issues and the legal consequences of those facts does not apply in FLSA cases. The conflict Petitioners see is illusory.[7]

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[7]Petitioners also argue that the Ninth Circuit in this case made the same mistake that the lower courts did in *Skidmore* when it held that Petitioners engaged in too many personal activities while on-call for that time to be considered work. Pet. 12. This is incorrect. The lower courts in *Skidmore* held that on-call time was not work as a matter of law if employees could engage in *any* personal pursuits while on-call (323 U.S. at 140), even if the employees were restricted to the area immediately around their employer's premises. *Id.* at 136. Here, by contrast, the Ninth Circuit invoked no "all or nothing" rule. It simply held that, on the facts of this case, Petitioners' on-call time was not compensable where they could use that time to engage in a wide variety of personal pursuits, either at their own homes or throughout the County.

B. The District Courts Should Not Be Given The Exclusive Role In Deciding FLSA Cases.

As a fall-back to their conflict argument, Petitioners argue that whether a given set of on-call requirements constitutes work must be determined by the District Courts as a question of fact, rather than by the Courts of Appeals (and, ultimately, this Court) as a matter of law. Petitioners' argument conflicts with *Icicle Seafoods*, where the Court explicitly recognized that whether a specific set of facts gives rise to liability under the FLSA is a legal issue for the appellate courts:

> "The question whether [the employees'] particular activities excluded them from the overtime benefits of the FLSA is a question of law. . . . If [the Court of Appeals] believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment." (475 U.S. at 714)

Moreover, the regime envisioned by Petitioners—in which District Court findings regarding compensability would be largely unreviewable—has nothing to recommend it. If compensability is purely a factual question, then two fact-finders may reach opposite conclusions on the same set of facts, and the appellate courts will be powerless to intervene unless one determination was clearly erroneous. *See Anderson v. Bessemer City*, 470 U.S. 564, 577 (1985) (Court of Appeals could not reverse District Court's finding where neither the trial court's interpretation of the facts nor that of the appellate court was illogical or implausible). In that event, the FLSA will not only mean one thing in California and another in Alabama (which Petitioners assert is desirable!), its interpretation will also vary from one courtroom to the next within the very same jurisdiction, and no appellate court will be able to impose uniformity due to the strictures of Rule 52(a).

Such balkanization of federal labor law is both unwise and unnecessary. In enacting the FLSA, "Congress intended . . . to achieve a *uniform national policy* of guaranteeing compensation for all work or employment . . . covered by the Act." *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 741 (1981) (emphasis added). That uniform national policy promotes compliance with the Act by providing employers with an evolving "appellate consensus" (Pet. 12) governing entitlement to on-call compensation. Conversely, both uniformity and predictability will be a thing of the past if enforcement of the FLSA comes to depend on the vagaries of fact-finding by individual judges and juries.[8] Meaningful appellate review under uniform national principles of law is the only way to prevent FLSA jurisprudence from becoming "a crazy-quilt of *ad hoc* judgments about dissimilar configurations of fact." Pet. 13.[9]

Moreover, Petitioners err in asserting that "[t]he appellate courts do not have the expertise or the authority to make judgments about the acceptable limits of work and leisure as a matter of national law." *Id.* "It is not uncommon for federal courts to fashion federal law where federal rights are concerned." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957). A federal judiciary accustomed to setting the economic "rules of the road" under the Sherman Act or deciding whether a new invention is too "obvious" under the prior art to be patentable surely has the expertise

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[8]Although this case involved a bench trial, many cases involving claims for on-call compensation are submitted to juries. *See, e.g., May v. Arkansas Forestry Comm'n*, 993 F.2d 632, 634-35 (8th Cir. 1993).

[9]As this Court noted in *Barrentine*, employers who violate the Act may incur substantial liability, in the form of "actual and liquidated damages, reasonable attorney's fees, and costs." 450 U.S. at 745. (Indeed, the total judgment in this case, which involved only four employees and did not include liquidated damages, amounted to more than $400,000.) Given such penalties, employers have a strong and entirely legitimate interest in the development of a "federal common law" interpreting the Act's rather general commands.

to determine whether overtime is compensable under the FLSA. Indeed, what the Court said about the judicial determination of "obviousness" under the patent law is equally true here:

> "What is obvious is not a question upon which there is likely to be uniformity of thought in every given factual context. The difficulties, however, . . . should be amenable to a case-by-case development." (*Graham v. John Deere Co.*, 383 U.S. 1, 18 (1966))

Indeed, the very case law canvassed by Petitioners indicates that the appellate courts are up to the task of deciding on-call cases in a principled way. As Petitioners themselves note, the appellate courts are in the process of developing a consensus as to how on-call compensability is affected by such factors as the employer's required response time, the geographical restrictions imposed on employees, and the employees' use of a pager. Pet. 12. The fact that "case-by-case development" in this area may lead to "ever-more-delicate analogies and distinctions between different work environments" (Pet. 13) indicates that the process is working, not that it should be junked.[10]

Nor are Petitioners correct in arguing that the case-by-case adjudication of on-call cases has led to conflicts. As the Ninth Circuit stated, this case "can be easily distinguished from *Renfro [v. City of Emporia*, 948 F.2d 1529 (10th Cir. 1991), *cert. dismissed*, --U.S.--, 117 L. Ed. 2d 510 (1992)]." Pet. App. 19a. For example, in that case, the firefighters had to report to the fire station within twenty

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[10]Petitioners also claim that the appellate courts are incapable of appreciating geographical nuances between cases, because they are not versed in the "milieu" out of which the cases arise. Pet. 11. But local customs are largely irrelevant to determining the FLSA's reach. *Jewell Ridge Coal Corp. v. Local No. 6167, United Mineworkers*, 325 U.S. 161, 166-67 (1945). And the idea that federal appellate judges are too dense to understand that pagers may work better in a flat metropolitan area than in hilly Sonoma County (Pet. 12) is unworthy of response.

minutes of being summoned (948 F.2d at 1532), while Petitioners in most instances may conduct their investigations by telephone. *See* pp.3-4, *supra*. Consequently, as the Court of Appeals recognized, the burden each interruption imposes on Petitioners is "substantially different than being required to return to the employer's premises within twenty minutes." Pet. App. 15a.[11] Moreover, as the Ninth Circuit also pointed out, there are numerous other factual differences between this case and *Renfro*, differences which destroy Petitioners' claim of conflict. Pet. App. 19a.[12]

C. The Decision Below Does Not Violate Rule 52(a).

Petitioners' claim that the Ninth Circuit violated Rule 52(a) is neither cert-worthy nor correct. As Petitioners tacitly concede, this Court's decision in *Icicle Seafoods* defines "the appellate court's proper role in FLSA disputes over the character of work." Pet. 15. Absent a conflict among the Circuits (which does not exist), there would be no reason for this Court to revisit this issue now even if the decision below were erroneous.

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[11]Similarly, the on-call restrictions to which Petitioners are subject are far less onerous than those imposed in cases where the employees have to remain on the employer's premises. Yet even there on-call compensation has often been denied. *See, e.g., Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245, 1248-49 (5th Cir. 1986), *cert. denied*, 484 U.S. 827 (1987).

[12]For example, the firefighters in *Renfro* could not go out of town, due to the twenty-minute required response time. *See* 948 F.2d at 1532. In contrast, Petitioners are free to travel anywhere within the 1,600 square miles of Sonoma County, as long as they are reachable by telephone or pager. Pet. App. 42a-43a.

Moreover, contrary to Petitioners' assertion, the District Court held this case similar to *Renfro* in only one respect: the frequency with which Petitioners were called. Pet. App. 37a. The other references in the Petition to the District Court's purported reliance on *Renfro* summarize either the facts of that case (Pet. App. 32a, 42a) or the parties' contentions about its applicability (Pet. App. 32a, 48a).

But the decision below is not erroneous. In the first place, the Ninth Circuit accurately set forth the applicable standards of review:

> "We review the district court's findings of fact for clear error and its interpretation of the FLSA *de novo*. Whether and to what extent employees are able to use on-call time for personal activities is a question of fact. However, whether the limitations on the employees' personal activities while on-call are such that on-call waiting time would be considered compensable overtime under the FLSA is a question of law which we review *de novo*." (Pet. App. 6a-7a (citations omitted))

Moreover, the Court of Appeals carefully applied these standards to the District Court's findings. Petitioners do not contend that the Court of Appeals violated Rule 52(a) in its discussion of the second *Owens* factor, the agreements between the parties. Nor do they contend that the rule was violated with respect to several of the issues mentioned in *Owens* as bearing upon the employees' degree of personal freedom.[13] Accordingly, our analysis focusses on the specific sub-issues Petitioners have (mistakenly) identified as violations of Rule 52(a). As we shall see, in each instance, Petitioners' entire argument rests on a mischaracterization of the Ninth Circuit's decision:

- The Ninth Circuit did *not* find that the "frequency of calls" was one every 6.45 hours. Pet. 14.

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[13]The first two of the sub-issues mentioned by *Owens* in determining whether an employee has use of his or her on-call time for personal purposes are "whether there was an on-premises living requirement" and "whether there were excessive geographical restrictions on [the] employee's movements." 971 F.2d at 351. It is undisputed that Petitioners were not subject to an on-premises living requirement. Nor do Petitioners contest the Court of Appeals' treatment of the District Court's finding that Petitioners were allowed to travel on call anywhere within Sonoma County as long as they were "within fifteen or twenty minutes of a telephone or two-way radio, which each plaintiff had in his County vehicle." Pet. App. 43a.

Instead, it held that this statistic summarized the frequency of *death reports*. *See* note 5, *supra*. In finding the District Court's contrary finding on this subject "implausible," the Ninth Circuit simply meant that it was clearly erroneous under Rule 52(a). *See Anderson v. Bessemer City*, 470 U.S. 564, 577 (1985) (district court findings that are not illogical or implausible are protected by Rule 52(a)).

- The Ninth Circuit did *not* "assert[] that coroners were . . . under no limitations while on call." Pet. 14. The Court of Appeals merely held that the absence of a required response time *to report to the employer's premises* meant that Petitioners were not subject to any meaningful *geographical* limitation (unlike the firefighters in *Renfro*). Pet. App. 19a.

- The District Court did *not* find that three Petitioners could not use pagers. *See* note 4, *supra*. Nor did the Court of Appeals ignore what the District Court *did* find regarding the pagers' reliability. It simply held that, under the legal standards articulated in its prior decision in *Owens*, the trial court should not have focussed on the reliability of the pagers, but instead on their availability. *See* pp.7-8, *supra*.

- The District Court did *not* find that it was difficult for Petitioners to trade shifts. Instead, it found that they voluntarily chose not to do so. Pet. App. 44a-45a. The Court of Appeals, in turn, held that under its prior decision in *Owens*, the proper inquiry regarding trading shifts was whether Petitioners *could* trade shifts, not whether they did so. In finding that they could, the Court of Appeals did not reweigh the evidence, but instead relied on the relevant findings made by the trial court. *See* pp.8-9, *supra*.

Petitioners also misstate the law when they argue that the Court of Appeals violated Rule 52(a) in holding that

Petitioners were not entitled to on-call compensation under the FLSA. While Petitioners call this an "ultimate fact" protected by Rule 52(a), it is not. *See Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 743 (1981) (while arbitrators possess the expertise necessary to decide "preliminary factual questions," they lack the competence to decide "the ultimate *legal issue* whether an employee's right . . . to overtime pay under the statute has been violated") (emphasis added). As long as the Court of Appeals did not rewrite the District Court's factual findings (which it did not), it was free to determine *de novo* the legal significance of those findings. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986). And even if the trial court's ultimate conclusion that Petitioners' use of on-call time was sufficiently restricted so as to require compensation under the FLSA might under some circumstances be a finding of fact protected by Rule 52(a), that rule does not apply where a trial court's finding is "predicated on a misunderstanding of the governing rule of law." *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 501 (1984). That is precisely what occurred here, where (as the Ninth Circuit held), the District Court's analysis of the facts was inconsistent with the legal principles subsequently recognized by that court in *Owens*. *See* Pet. App. 6a ("*Owens* controls our decision in this case").

II.

THE DECISION BELOW DOES NOT HOLD THAT PETITIONERS WAIVED THEIR FLSA RIGHTS.

Petitioners' second purported reason for granting the writ rests on the same sort of misstatement of the record as their first. Contrary to the implication of the second "question presented," the Ninth Circuit did not hold that Petitioners' FLSA rights were waived by a collective bargaining agreement, nor was the Court of Appeals' discussion of the parties' agreements an "alternative ground" (Pet. 16) for reversal. What the Ninth Circuit actually held was far more modest, and is fully consistent

with the decisions of both this Court, the Courts of Appeals, and the applicable FLSA regulations.

Instead of focusing exclusively on the Memorandum of Understanding between Petitioners' employee association and the County, the Ninth Circuit identified "three different types of agreements between the employer and employees which may be relevant to the issue of on-call compensation." Pet. App. 7a. These include applicable collective bargaining agreements, a constructive agreement if employees are informed of the overtime compensation policy, and an express agreement if the employees voluntarily accept the employer's overtime policy by beginning work after the policy has been implemented. *Id.* at 7a-8a. The Court of Appeals also held that these agreements are *not* dispositive (*id.* at 7a n.5), and are relevant *only* where there is otherwise serious doubt as to the applicability of the FLSA. *Id.* at 8a. Even in such cases, the parties' agreements do not waive rights under the FLSA; instead, they are only evidence of "whether [the parties] intended to define the activity or non-activity as work." *Id.*

This holding does not conflict with this Court's rulings that FLSA rights cannot be waived. The very same decisions which established the principle that contract or custom cannot waive FLSA rights simultaneously recognize that evidence of custom or contract *is* relevant "to settle difficult and doubtful questions as to whether certain activity or non-activity constitutes work." *Jewell Ridge Coal Corp. v. Local No. 6167, United Mineworkers*, 325 U.S. 161, 170 (1945); *see Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 603 (1944). Indeed, the District Court in this case candidly conceded that "[t]he Supreme Court, in both *Jewell Ridge* and *Tennessee Coal*, went to great lengths to distinguish the facts . . . from those present in the . . . 'waiting time' or 'on-call' cases" such as *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) and *Armour & Co. v. Wantock*, 323 U.S. 126 (1944). *See* Pet. App. 53a. *Jewell Ridge* and *Tennessee Coal* thus did not disturb this Court's holding in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), that among the

facts relevant to determining whether on-call time falls within the FLSA are "the agreements between the particular parties" and "appraisal of their practical construction of the working agreement by conduct." *Id.* at 137.[14]

This rule accords with the regulations interpreting the FLSA issued by the Department of Labor. 29 C.F.R. §785.14 (1993) quotes this precise language from *Skidmore* in illustrating the rule that "[w]hether waiting time is time

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[14]For similar reasons, there is no conflict between the decision below and the other Court of Appeals decisions cited by Petitioners. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507 (9th Cir. 1978), simply holds that a collective bargaining agreement cannot waive an employee's unquestioned right under the FLSA to be paid overtime when he or she works more than forty hours in a week. *Id.* at 513-14. *Wethington v. City of Montgomery*, 935 F.2d 222 (11th Cir. 1991), holds that if a particular pay scheme does not violate the Act when embodied in a collective bargaining agreement, it does not violate the Act when the employer adopts it unilaterally. *Id.* at 229. Neither *Lerwill* nor *Wethington* is even an on-call case, much less one where the agreements of the parties were used to determine whether the employer's restrictions turned on-call time into work.

Nor is there any conflict between the decision below and *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985). Contrary to Petitioners' assertion, the Ninth Circuit in this case did not hold that the employees' "subjective characterization" of their work (Pet. 18) determines FLSA coverage. Instead, the Court of Appeals looked at the employees' conduct, not their words. That is exactly what this Court did in *Tony & Susan Alamo Foundation*. In that case, the employees stated that they were "volunteering" their services to a religious ministry's commercial enterprises and hence were not "employees" covered by the FLSA. *Id.* at 300. In rejecting this claim, the Court relied on the District Court's finding that the employees' own conduct indicated that they expected to receive in-kind benefits in exchange for their services. *Id.* at 301-02. Similarly, the decision below relied on the employees' conduct in determining the scope of FLSA coverage. The decision below therefore does not conflict with *Tony & Susan Alamo Foundation*.

Livadas v. Bradshaw, –U.S.–, 129 L. Ed. 2d 93 (1994), is even further afield. That case invalidated a state policy of refusing to enforce certain statutes regulating the payment of wages where the employees were covered by a collective bargaining agreement. That case did not involve any question of waiver, and neither does this one.

worked under the Act depends upon particular circumstances." *See* Pet. 3 (quoting regulation).[15]

It also accords with common sense. If on-call time really imposed an onerous burden on Petitioners, one would expect them to protest the imposition and their employee association to vigorously demand at least some compensation for time spent on-call. But none of this happened. Two Petitioners never protested at all, while the remaining two filed a protest that did not even address the lack of overtime compensation. Pet. App. 11a. All of the Petitioners eagerly sought the generous benefits provided by the County under its existing overtime policy, including the opportunity to earn an hour or two of overtime for making a five-minute telephone investigation. *See id.* at 4a-5a. Indeed, they volunteered to work as coroners in part because of the opportunity to earn overtime under the policy they now attack, and the more senior members chose shifts with the most on-call time. *Id.* at 53a. Petitioners' employee association voluntarily *surrendered* the coroners' pre-existing contractual entitlement to on-call compensation.[16] Such conduct, while not dispositive, nevertheless undermines Petitioners' claim that the restrictions imposed on their use of on-call time are so restrictive as to require overtime pay under the FLSA.

The fact that agreements are only evidentiary, rather than dispositive, disposes of Petitioners' concerns. Indeed, Petitioners' fear that union weakness at the bargaining table

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[15]While not controlling, regulations interpreting the FLSA "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. at 140.

[16]"Prior to 1982, coroners were paid 5% of their hourly pay for each hour on-call." Pet. App. 53a. In that year, however, the employee association agreed to an MOU that eliminated this supplement. (While the same agreement gave the coroners a "5% premium" in their hourly pay (*id.*), the trial court specifically found that "the 5% premium was not part of the parties' agreement regarding on-call compensation." *Id.* at 56a.)

will lead to surrender of employees' FLSA rights is based only on their own misreading of the decision below. If a collective bargaining agreement, or an individual employee's acquiescence in the employer's overtime policy, is merely the result of "superior bargaining power" (Pet. 18) or the employee's fear that protests will be punished, the employee can offer proof of that fact and that proof, if accepted, will render the agreements irrelevant. Indeed, the Ninth Circuit in this case considered and rejected several arguments made by Petitioners which attempted to discount the evidentiary value of the agreements. Pet. App. 10a-11a. If, conversely, the employees' own conduct—or that of their association—indicates that on-call restrictions are not onerous, the parties' agreements *are* relevant to determining whether the employees can use that time for their own benefit. The Ninth Circuit's decision reaffirming this principle raises no issue worthy of review.

CONCLUSION

The petition should be denied.

DATED: January 9, 1995.

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No. 94-1044

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v.
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC IN SUPPORT OF PETITIONER

The Service Employees International Union, AFL-CIO, CLC respectfully submits this brief with the consent of the parties as *amicus curiae* in support of the petition for certiorari.

INTEREST OF *AMICUS CURIAE*

The Service Employees International Union (SEIU) is a labor organization with approximately one million members in the United States. It is the fourth largest

union in the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO).

SEIU represents many service sector employees such as home health aides, nursing home workers, and janitors. Many of SEIU's members are low-wage workers who depend on active enforcement and strict construction of the Fair Labor Standards Act to insure that they earn wages that are minimally adequate to support their families.

In the rapidly changing and highly competitive service sector, SEIU members are increasingly required to remain ready to return to work when they are not on active duty and to suffer accompanying restrictions of their liberty. For example, hospital workers that SEIU represents have much in common with the coroners in this case. Both have jobs in which the workload depends upon the unpredictable nature of human tragedies. Hospitals administrators, with increasing frequency, place workers on call and impose various types of restrictions on their movement and activities to insure that they will be able to respond to an emergency rather than having them remain in the hospital. Throughout the service sector, more and more workers are no longer reporting to a workplace outside their home and remaining there for a fixed shift each day. Over 15% of American workers work flexible schedules and almost 20% perform job-related duties at home. *See,* Commission on the Future of Worker-Management Relations, Fact Finding Report 20 (1994). Yet what appears on the surface to be a trend toward greater flexibility also involves increased constraints on workers; more and more workers are being required to remain available for work on a continuous basis. *See,* Reed, *Be Wary of Beeper Bondage,* New York Times, April 17, 1994, Sec. 3, at 13, col. 3.

SEIU therefore has a great interest in urging this Court to grant certiorari because the Ninth Circuit's decision undermines the FLSA's protection of the many union members who are required to perform standby duties.

ARGUMENT

THERE IS A DIRECT CONFLICT BETWEEN THIS COURT'S DECISIONS IN *BARRENTINE* AND *SKIDMORE*

The Ninth Circuit's decision in this case is just one example of the confusion among the lower federal courts and the state courts concerning the significance of collective bargaining agreements and agreements between individual workers and their employers in determining whether standby time is work. This confusion is the result of a direct conflict between this Court's decisions in *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

In *Skidmore* and its companion case *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), this Court considered the questions of whether waiting time could be classified as work for purposes of the FLSA and, if so, how to determine when waiting time should be so classified. After resolving the first question in the affirmative, this Court instructed trial courts on how to resolve the second. This Court stated that categorization of standby time as work or nonwork "involves scrutiny and construction of the agreements between the particular parties." *Skidmore*, 323 U.S. at 137.*

Relying on this instruction, the Ninth Circuit and numerous other lower courts have held that parties can agree that waiting time is not work time. *See, e.g., Berry v. County of Sonoma*, 30 F.3d 1174, 1180-82 (9th Cir. 1994), Pet. App. 7a-11a; *Owens v. Local No. 169*, 971 F.2d 347, 354-55 (9th Cir. 1992); *Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245, 1248 (5th Cir. 1986), *cert. denied*, 484 U.S. 827 (1987); *Allen v. Atlantic Richfield Co.*, 724 F.2d 1131, 1134 (5th Cir.

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* This language is quoted in the Department of Labor's waiting time regulations. 29 C.F.R. § 785.14.

1984); *Bowers v. Remington Rand, Inc.*, 159 F.2d 114, 116-17 (7th Cir. 1946), *cert. denied*, 330 U.S. 843 (1947). The Ninth Circuit in this case stated that the agreement between the parties is "one of the predominant factors to be considered in determining whether the employees' on-call waiting time is compensable." *Berry*, 30 F.3d at 1180, Pet. App. 7a. Many courts, including the Ninth Circuit in this case, have also held that this agreement need not even be between individual workers and their employer, but may be between a union and an employer. *See, e.g., id.; Owens*, 971 F.2d at 355. In fact, some courts have held that this agreement need not even be express, but may be implied from employees' continued abidance of the waiting time restrictions in the absence of compensation according with the FLSA. *See, e.g., Berry*, 30 F.3d at 1180-81, Pet. App. at 8a-9a; *Owens*, 971 F.2d at 355; *Rousseau*, 805 F.2d at 1248.

The lower courts' construction of *Skidmore*, as exemplified by the Ninth Circuit decision in this case, conflicts with this Court's more recent holding in *Barrentine*. In *Barrentine*, this Court held that a union cannot waive workers' rights under the FLSA. This Court reasoned, "FLSA rights . . . are independent of the collective-bargaining process. They devolve on [employees] as individual workers, not as members of a collective organization." 450 U.S. at 745. Therefore, this Court held, "congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement." *Id.* at 740-41. This Court held in *Barrentine* that a union could not agree that truck drivers conducting pre-trip inspections were not performing "work" for purposes of the FLSA. It would seem to follow logically that a union also may not agree that the same employees' waiting time is not "work" and therefore that the employees lawfully may be paid nothing for their time.

In fact, the logic of *Barrentine* is particularly strong as applied to waiting time because unions like SEIU often

represent large units of workers, only a few of whom are required to be on-call. The pressures of majority rule may thus lead unions to trade-off the individual statutory right of the minority to be paid for waiting time in order to gain benefits for the majority. As this Court reasoned, "a union balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole." *Barrentine*, 450 U.S. at 742. The majority should not be allowed to trade-off the minority's statutory rights, this Court held in *Barrentine*.

Even if *Skidmore* is construed to refer lower courts only to agreements between individual workers and their employers, it is still in tension with *Barrentine*. In *Barrentine*, this Court reaffirmed the "nonwaivable" nature of the rights to a minimum wage and overtime compensation: "FLSA rights cannot be abridged by contract or otherwise waived." *Id.* at 740. Yet lower courts have read *Skidmore* to hold that employees can effectively waive their FLSA rights by agreeing that waiting time is not work.

In this case, the Ninth Circuit attempted to resolve the tension in this Court's case law when it stated, "Our emphasis o[n] the parties' agreement as a predominant factor is not intended to suggest that agreements are controlling regardless of the character of the uncompensated time at issue." *Berry*, 30 F.3d at 1181, Pet. App. at 8a. Where there is "no uncertainty that the uncompensated time at issue . . . was actually work," the Court agreed that "the FLSA was not designed to perpetuate contracts pursuant to which employers fail to compensate employees for work." *Id.* But where there are "serious doubts as to whether certain activity or non-activity constitutes work . . . the parties' agreements are persuasive evidence." *Id.*

The problem with this proposed resolution of the tension is that virtually all jobs involve some waiting time.

A receptionist waits for the phone to ring, a secretary waits for typing assignments, a hospital orderly waits for an operation to be completed. Although this case involves off-premises waiting-time, the lower courts have applied the reasoning in *Skidmore* to find time when employees are required to remain on the employer's premises not to be work. *See, e.g., Rousseau,* 805 F.2d at 1248; *Allen,* 724 F.2d at 1134. *Cf. Service Employees International Union, Local 102 v. County of San Diego,* 35 F.3d 483, 490 (9th Cir. 1994) (relying on provision of compensation in collective bargaining agreement to support holding that on-site standby duty was work).

If, under *Skidmore,* employees can agree that such waiting time is not work for which they must be compensated in accordance with the FLSA, then employers can undermine this Court's holding in *Barrentine.* By obtaining employees' agreement that waiting time is not work, employers can obtain what this Court forbids in *Barrentine*—a binding waiver of employees' statutory right to be paid a minimum wage and premium compensation for overtime.

CONCLUSION

Barrentine and *Skidmore* are in direct conflict. This conflict has created confusion and unfairness in the lower courts. This Court should grant certiorari in this case in order to make clear that *Barrentine* overruled *Skidmore* or to otherwise reconcile these inconsistent holdings.

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners respectfully submit this reply under Sup. Ct. Rule 15.6 to arguments newly raised in the Brief in Opposition.

I. THERE IS A CONFLICT WITHIN THE CIRCUITS.

Respondents suggest that there is no difference between the Eighth Circuit's approach in *Cross v. Arkansas Forestry Comm'n,* 938 F.2d 912, 916-917 (8th Cir.

1991), *May v. Arkansas Forestry Comm'n,* 993 F.2d 632, 639 (8th Cir. 1993) and *Henson v. Pulaski County Sheriff Dept.,* 6 F.3d 531, 537 (8th Cir. 1993) and that of the Fifth, Ninth and Eleventh Circuits. Opp. at 12-13.

While the Eighth Circuit did affirm a partial summary judgment in *Henson,* it did so only because the appellants had urged an incorrect legal standard, that employees be "completely relieved of duty" before they lost their entitlement to pay. *See* 6 F.3d at 534-535. Once the Court adopted the "predominately for the benefit of the employer" standard, the appellants in *Henson* did not contend that they were still entitled to pay for the lunch periods at issue. *See id.*

The conflict in the Circuits involves the application of the "predominately for the benefit of the employer" standard. In this case, as in *Cross, May* and the second summary judgment reversed in *Henson,* the question is whether a given set of facts supports the plaintiffs' claim that their on-call duty has been spent "predominately for the benefit of the employer." The Eighth Circuit properly follows *Skidmore v. Swift & Co.,* 323 U.S. 134, 136-137 (1944) to leave this judgment for the fact-finder. The logic of the contrary rule in the Fifth, Ninth and Eleventh Circuits is that the appellate courts must make this determination *de novo* from national rules of law about what duties are unduly restrictive. If the issue of what time is deemed "predominately for the employer's benefit" is one of law, as the Fifth, Ninth and Eleventh Circuits hold, then the fact-finder will have only an advisory role.

II. THE NINTH CIRCUIT REVERSED ON ISSUES OF FACT, NOT LAW.

Respondents contend that the Ninth Circuit corrected errors of law, not fact, in reversing the District Court. In particular, Respondents argue that the District Court's analysis was legally inconsistent with the multi-factor test for compensability outlined in *Owens v. Local 169, Ass'n*

of Pulp & Paper Workers, 971 F.2d 347, 351 (9th Cir. 1992). Opp. at 4-5.

Respondents are incorrect. In *Owens,* the Ninth Circuit adopted a list of seven factors relevant to whether on-call time could be considered work time. 971 F.2d at 351. Respondents cannot argue that this list of factors was somehow at odds with the District Court's analysis in this case, because the *Owens* court adopted this list of factors directly from the District Court's published (and as yet unreviewed) decision in this case. *See id., citing Berry v. County of Sonoma,* 763 F.Supp. 1055, 1058 [Pet.App. 72a-73a] (N.D. Cal. 1991).

The Ninth Circuit reversed in this case, not because the District Court analyzed the wrong factors, but because the Ninth Circuit disagreed with the weight the District Court gave to the evidence on this issue. But the presence of a multi-factor balancing test on an issue does not permit an appellate court to exercise *de novo* review whenever it believes that the factors should have been weighed differently. *See, e.g., Knight v. United Farm Bureau Mut. Ins. Co.,* 950 F.2d 377, 381 (7th Cir. 1991).

For example, the Ninth Circuit believed that the District Court should have considered only death reports, rather than the more frequent work-related calls, *cf.* Opp. at 20-21 *with* Pet.App. 37a, 40a; that the District Court should not have given weight to the unwritten practice that coroners respond within fifteen minutes, or that the coroners had to make an on-site response to calls once every 4.25 calls, *cf.* Opp. at 21 *with* Pet.App. at 34a, 37a; that the District Court should have found pagers relieved restrictions so long as they were available, despite their unreliability for three of the four plaintiffs. *Cf.* Opp. at 21 *with* Pet.App. 40a-41a.

These are judgments of fact, not law. The appellate courts will commit themselves to a Byzantine structure of decisions about beepers and radios and babysitting and

leather crafts if they continue administering the boundaries of work *de novo*. It will be possible for appellate courts to reconcile apparent conflicts, like that between this case and *Renfro v. City of Emporia*, 948 F.2d 1529 (10th Cir. 1991), *cert. dismissed*, 112 S.Ct. 1310 (1992), only by drawing hyper-specific distinction between different types of work duty as a matter of national law.[1]

III. THE NINTH CIRCUIT WRONGLY HELD THE PETITIONERS' COLLECTIVE BARGAINING AGREEMENT AGAINST THEIR FLSA CLAIM.

As *amicus curiae* Service Employees International Union argues, the Ninth Circuit repudiated the anti-waiver rule of *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) by holding the petitioners' failure to secure on-call compensation to be a "predominant factor" for reversing the District Court's judgment. Respondents argue that the absence of an agreement is relevant as a matter of common sense, in that it supposedly shows that the coroners did not in fact consider on-call time to be work time. Opp. at 22-26.

Respondents may not have it both ways. If the parties' agreements or objections are relevant as a factual matter, then Respondents are bound by the District Court's factual judgment that the coroners were not paid for on-call duty because of budgetary constraints, not because of any genuine consensus that such duty was not work. Pet.App.

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[1] A newly reported example of the lengths to which the appellate courts must go in dictating the boundaries of work is *Reich v. IBP, Inc.*, 38 F.3d 1123, 1125-26 (10th Cir. 1994). In that case, the Tenth Circuit found it necessary to reevaluate the factual record *de novo* after the District Court had made findings of fact under Fed.R.Civ.P. 52(a). The Tenth Circuit ruled as a matter of law that time meatpackers spend donning and doffing hard hats, safety glasses, earplugs and safety shoes was not "work," while time spent by specialists (i.e., those who used knives) donning and doffing specialized protective mesh was compensable "work." 38 F.3d at 1125-26.

55a-57a & n.9. By reversing on this issue, the Ninth Circuit engaged in its own appellate fact-finding, in substitution for the District Court's. Pet.App. 10a-11a.

CONCLUSION

The Court should grant the petition for certiorari.

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